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IN THE

# Supreme Court of the United States

October Term, 1968.

No. 924.

LEWES DAIRY, INC., and CLIFFORD S. OTT, et al.,
d/b/a HOLLYBROOK DAIRY,
*Petitioners,*

*v.*

ORVILLE L. FREEMAN, Secretary of Agriculture,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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LEWES DAIRY, INC., AND CLIFFORD S. OTT, ET AL., D/B/A HOLLYBROOK DAIRY,
*Petitioners,*

*v.*

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners ask that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in its case No. 16,528.

## OPINIONS BELOW.

The opinion of the Court of Appeals in No. 16,528, dated September 25, 1968, is reported at 401 F. 2d 308 (1968) and is printed in the appendix hereto (App. Petition 66a). The opinion of the United States District Court for the District of Delaware, which was reversed by the Court of Appeals, is reported at 260 F. Supp. 921 (1966),

and is contained in the appendix (App. Petition 49a). The preceding opinions rendered in the proceedings before the Secretary of Agriculture are also set forth in the appendix (App. Petition 1a, 23a), and the final opinion there is reported at 25 Agric. Dec. 709 (1966).

## JURISDICTION.

The judgment of the Court of Appeals sought to be reviewed was dated and entered September 25, 1968 (App. Petition 88a). A timely petition for re-hearing was filed with the Court of Appeals on October 31, 1968, after the granting of an extension therefor, and that petition was denied on November 19, 1968. The jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred upon this Court by 28 U. S. C. § 1254(1).

## QUESTION PRESENTED.

Whether a Federal Milk Marketing Order violates the prohibition against economic trade barriers contained in § 8c(5)(G) of the Agricultural Marketing Agreement Act of 1937 when, as a consequence of a dairy's introducing some portion of its production into the market regulated by the Order, the Order extends its regulatory charges to all the dairy's business, including the more substantial portion of its business done in its local area, unregulated by any milk order, where its primary competition in buying and selling milk comes from other local dairies which are unregulated and therefore do not have to bear such regulatory charges.

## STATUTE INVOLVED.

The statute is § 8c(5)(G) of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 247, 7 U. S. C. § 608c(5)(G). It provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The Federal Milk Marketing Order here involved, promulgated by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, was originally denominated No. 127. During this litigation it has been amended periodically and is now designated No. 16 (7 C. F. R. Part 1016), and its operation in the context of this case is "beyond dispute" (App. Petition 68a).

## STATEMENT OF THE CASE.

This Court decided in *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. 76 (1962), that § 8c(5)(G) of the Agricultural Marketing Agreement Act prohibits the Secretary of Agriculture from creating, in Federal Milk Marketing Orders, "any kind of economic trade barriers" (p. 97) and, hence, prevents the Secretary from requiring "anything more of milk coming into a marketing area than that it 'comply with the same conditions which the farmers and distributors comply with in that region' " (p. 92). This case presents the question whether an unlawful trade barrier is created by such orders insofar as they require that, as a consequence of a dairy's shipping some portion of its production into the market regulated by an order, the dairy not only bear the regulatory charges of the order with respect to that production but also bear them with respect to the greater portion of its production which is sold in its local, unregulated market, where its competition does not have to bear similar charges.

### 1. Facts.

The facts, as well as the operation of the Milk Order, were conceded by the parties and found by the Court of Appeals to be "beyond dispute" (App. Petition 68a).

Petitioner Lewes Dairy, Inc.[1] operates one plant in which milk is bottled for sale in fluid form. The plant is located in Sussex County, Delaware (that State's counties being, from south to north, Sussex, Kent and New Castle) (App. Petition 70a, 25a).

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1. Petitioner Hollybrook Dairy went out of business after adoption of the Order here attacked, and the record applicable to both petitioners has been made in terms of Lewes' operations (App. Petition 67a, n. 2).

Lewes' primary source of milk is farmers in Sussex and Kent Counties, Delaware; Lewes buys from them in competition with the other dairies in this downstate area of Delaware (App. Petition 71-72a, 25-27a, & App. Below[2] 137-138a, 143a). Lewes sells more than half its production in this area, where its primary selling competition is the other downstate Delaware dairies (App. Petition 71-72a, 25-27a, & App. Below 143-146a, 153-156a, 177a).

This area of Delaware is not the subject of a Federal Milk Order. The other dairies in the area do all or almost all of their business locally and are unregulated (App. Petition 71-72a, 25-27a). The part of Lewes' production which is not marketed locally is sold on the Eastern Shore of Maryland, and because the portion sold there comprises more than 10% of Lewes' total production, the Federal Milk Order, which does apply within the State of Maryland, subjects Lewes to regulation in all its business, including that done solely in Delaware (App. Petition 71a, 25a).

**2. The Order.**[3]

The Maryland Order classifies milk according to the use made of it by a dairy, designating that which is processed for consumption in fluid form as Class I and that which is used for cheese and other manufactured products as Class II. A regulatory price is assigned by the Order to each class, with the higher price being assigned to Class I.

The Order guarantees farmers supplying a fully-regulated dairy a minimum price for their milk, not dependent upon the use the dairy makes of it, by requiring such a dairy to pay the farmers a minimum "blend" price, which is an

2. "App. Below" refers to the Joint Appendix in the Court of Appeals, which is the volume designated as item 3 in the certified transcript of record filed herein.

3. The detailed functioning of this Maryland Milk Order is much like that of the order described in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U. S. 76 at 80-81.

average of the Class I and II prices weighted according to the total utilization of milk in each class by all dairies fully regulated under the Order. Each dairy, however, is made ultimately to bear the class price as a minimum. For example, a dairy utilizing all of its milk in Class I form is required to pay to the Order's "producer settlement fund" the difference between the higher Class I price and the blend price; a dairy which has substantial Class II production is paid from the fund the difference between the blend and class utilization price for its milk.

Because Lewes introduces more than 10% of its production into the regulated Maryland market, the Maryland Order therefore requires Lewes, which processes its milk for consumption in fluid form, to pay into the Maryland producer settlement fund, on all the farmer milk it purchases (including that re-sold in Delaware), the difference between the blend price and the higher price assigned by the Order to Class I milk, regardless of whether Lewes has already had to pay the farmer a price higher than the blend price.[4] Lewes' Delaware competitors do not have to bear such a charge.

### 3. The Trade Barrier.

Lewes contends that the feature of the Order which extends the regulatory charges to all its business, rather than confining them to the portion having some relationship with the regulated area, creates an economic trade barrier against entering Maryland, in violation of the prohibition of §8c(5)(G) of the Act, as explained in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U. S. 76 (1962). As this case illustrates—

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4. As of June 1, 1967, the amount of the blend-Class I differential charges assessed against Lewes, which are being accumulated in the District Court's registry pending the outcome of this case, were in excess of $250,000 (App. Petition 71a, n. 8).

Because of its making some sales in Maryland, Lewes not only has to pay to the Delaware farmer the Delaware market price or the regulatory blend price, whichever is higher, but is also required to pay into the Maryland fund the blend-Class I differential charge on all of that milk, including the major portion of it which is resold in Delaware. Hence, as a result of shipping a fraction of its milk into Maryland, Lewes is burdened with a regulatory charge on its local Delaware business which its Delaware competition does not have to pay. Assuming that Lewes' Maryland sales represent as much as half its total production, this means, when viewed in another way, that Lewes must pay a regulatory charge with respect to the milk it ships into Maryland that is, in effect, double the charge levied upon Maryland milk.

**4. The Litigation.**

The Maryland Order issued December 28, 1959. Thereupon Lewes instituted this case, attacking the Order's validity on broad grounds, by filing a petition with the Secretary of Agriculture under § 8c(15)(A) of the Act, 7 U. S. C. § 608c(15)(A), providing for such proceedings and appropriate relief if an order "is not in accordance with law."

After the Department of Agriculture ruled against Lewes, and pending its review proceedings in the District Court, for which provision is made by 7 U. S. C. § 608c(15)(B), this Court decided *Lehigh*. Thereafter, Lewes narrowed its case to the trade barrier prohibition point explained by that decision. The District Court ruled for Lewes (214 F. Supp. 616 (1963)), but the Court of Appeals reversed on the ground that the matter should be remanded for development of the trade barrier issue before the Department of Agriculture (337 F. 2d 827 (1964)). This Court denied Lewes' petition for certiorari (379 U. S. 1000 (1965)).

On remand the Secretary ruled against Lewes (App. Petition 23a, 25 Agric. Dec. 709 (1966)), and on review the District Court ruled for it (App. Petition 49a, 260 F. Supp. 921 (1966)). The Court of Appeals reversed again, handing down the decision to which this petition is directed (App. Petition 66a, 401 F. 2d 308 (1968)).

Although the opinion of the Court of Appeals is couched in terms of a failure of proof, perhaps suggesting that this is simply a "fact" case, Lewes asks this Court's particular consideration of whether, in fairness, it can be so regarded. Lewes submits that the decision inescapably constitutes a ruling that no economic trade barrier is created by a milk order's exaction of a regulatory charge on all a dairy's business, even though, as the record here conclusively establishes, the dairy ships only a portion of its production into the area regulated by the order and sells the major portion in the unregulated area where it is located and where its buying and selling competition does not have to bear such a charge. Accordingly, Lewes urges that if it has to compete in buying its milk in Delaware and in selling it there—which is undisputed—and, in consequence of selling some milk in Maryland, also has to pay a substantial regulatory charge on all the milk it buys and resells in Delaware that its Delaware competition is not required to pay—which is clear in the record—the trade barrier question is raised by those simple facts, and, therefore, the dates, prices, quantities and names of buyers and sellers among Lewes' competition simply cannot have the critical significance to the case which is attributed to them by the Court of Appeals.

## REASONS FOR GRANTING THE WRIT.

The ruling of the Court of Appeals is important to the milk industry nationally. It disposes of the significant regulatory question approached but expressly left open in *Lehigh,* and yet it does so in violation of the statutory principle enunciated there and subsequently illustrated by *Polar Ice Cream & Creamery Co. v. Andrews,* 375 U. S. 361 (1964).

### 1. The Importance of the Trade Barrier Question Presented by This Case.

The Secretary of Agriculture has characterized this case as one that "involves a question of great public interest" (Appellant's Opposition to Lewes Dairy's Motion to Dismiss in the first appeal herein to the Court of Appeals, No. 14,643, p. 2). In the brief opposing Lewes' prior petition for certiorari and urging this Court not to consider the case because of its then "interlocutory posture," the government said (Brief in Opposition in No. 717, October Term 1964, pp. 8-9)—"The basis of the challenge is such that, if sustained, it is very likely to have serious, adverse consequences on the nation-wide program of federal economic regulation pertaining to the dairy industry."[5]

In *Lehigh* this Court reversed the same Court of Appeals and held invalid, on trade barrier grounds, the amount of a milk order's compensatory payment charge. That charge applied only to the milk shipped into a regu-

5. It should be noted that the question here was squarely presented and resolved against the Secretary in at least one other reported District Court opinion, *U. S. v. Sunny Hill Farms Dairy Co.*, 258 F. Supp 94 (E. D. Mo. 1966). It is of interest that this District Court decision was not appealed.

lated market by a dairy introducing so small a percentage of its total production—such as 10% or less—that regulation was not extended to all of its business. The industry significance of such a charge hardly compares with the effect of fully regulating outside dairies which ship more than 10% of their production into a regulated market but still do substantial business outside.

**2. The Need for a Conclusive Adjudication of the Question.**

In *Lehigh* the Court approached the question presented here but deferred a final decision of it.

There the Secretary of Agriculture argued that his compensatory payment charge should be sustained, despite its trade barrier effect, because the dairy could have elected under the milk order to become fully regulated, as an alternative to paying that charge. In rejecting that argument the Court observed that "[t]he consequences of joining the pool would have been that petitioners would have been forced to pay the 'blend price' to all their producers wherever located and account to the Producer Settlement Fund for all milk wherever sold" (370 U. S. at 99). It ruled: "In these circumstances the election was not voluntary . . . It was coercive and, indeed, no election at all" (370 U. S. at 99).

The Court in *Lehigh* then went on to make it clear that there it was not passing upon the validity of full regulation as such (370 U. S. at 99):

> "Whether full regulation of the petitioners would be permissible under the Act is a question which we need not reach in this case. If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, the validity of such a provision would involve considerations different from those now before us."

Here the Secretary has imposed such full regulation as a consequence of a dairy's introducing more than 10% of its production into the regulated Maryland market. In the case of Lewes, it is subjected to full regulation because of this fact, without regard to the fact that it sells more than half of its production in its local Delaware market where its competition is not regulated.

The trade barrier prohibition question left open by *Lehigh* is therefore presented here. A conclusive, full-circle adjudication of this important question, governing a multitude of daily transactions in a vital industry, is needed. This need is emphasized by the manner in which the Court of Appeals treated this case after eight years of litigation.

### 3. The Effect of the Court of Appeals Decision.

That Court's opinion necessarily decides that no prohibited economic barrier to trade in a regulated market is shown by this record, although the record conclusively establishes that, as a result of shipping less than half its production into the regulated Maryland market, Lewes is required to bear that market's regulatory charge on all its business, including the more substantial amount done in its local area of Delaware, where its local competition does not have to bear any such charge. This, Lewes submits, is an incorrect determination of the important question here involved, in that it altogether disregards the principle of the trade barrier prohibition explained in *Lehigh* and illustrated in *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U. S. 361 (1964).

By distilling from the legislaive history the objectives of the statute, *Lehigh* made it clear that § 8c(5)(G) was designed to deny to the Secretary the authority to interpose

economic restrictions upon the introduction of milk from an outside producing area into a regulated market which go beyond placing the outside milk on an equal competitive footing with other milk sold in the area. In *Polar,* where a state milk regulation was held invalid under the Commerce Clause, the Court equated the Constitutional limitation upon state regulatory power and the § 8c(5)(G) limitation upon the Secretary, saying that "[w]e seriously doubt that Congress, in denying the power to the Secretary, thereby granted it to the states" (375 U. S. at 379).

Clearly the Commerce Clause would not permit the State of Maryland to require that, as a condition of shipping some milk into that state, an outside dairy also bear a Maryland regulatory charge upon its business done solely outside.

**4. The Manner in Which the Court of Appeals Reached That Decision.**

The opinion is largely a discussion of the proof, tending to avoid the substantive issue involved. The rejection of almost any plaintiff's case can be cast in terms of a failure of proof. Lewes urges that this flavor of the opinion not be permitted to obscure its necessary substantive effect. To be sure there is no misunderstanding about its having just that effect, some mention of the details of the opinion may be justified.

(a) *The opinion's reference to Lewes' volume and profitability:* The opinion makes a point of the fact that Lewes' over-all volume of business has increased since the Milk Order has been in effect and notes that Lewes offered no evidence as to the profitability of its business (App.

Petition 79-81a).[6] However, the opinion never says what the significance of the point is.

In *Lehigh* a prohibited trade barrier was found to exist completely without reference to the petitioning dairy's ability to stay in business or even prosper in spite of the barrier. Obviously, Lewes would make more money, or lose less, if it did not also have to pay a regulatory charge on its Delaware business as a result of making some sales in Maryland. The point would be relevant only if—at least in the case of full regulation of outside dairies shipping a portion of their production into a regulated market—the existence of a prohibited trade barrier depends upon the extent to which the regulation affects volume or profits, so that it is lawful where a dairy can still make money in spite of the regulation and only constitutes an unlawful trade barrier where the dairy cannot.

Attributing such significance to this point indeed constitutes a ruling of importance on the substantive, trade barrier issue.

(b) *The opinion's assertion that Lewes' evidence "fell far short of the required specific showing"* (App. Petition 79a): In making this point, the opinion does not explain exactly what the required showing is which Lewes should have made or why more specificity is required.

Lewes' evidence conclusively established that it purchases from Delaware farmers in competition with unregulated Delaware dairies and that these unregulated dairies are its primary selling competition in Delaware. On the basis of this, Lewes claims that a trade barrier was created by the feature of the Maryland Milk Order requiring it, as a result of its shipments into Maryland, also to pay on its

6. The opinion also suggests that Lewes injected this subject into the case (App. Petition 80-81a), but it in fact was the Secretary who raised the point, not Lewes.

Delaware business the Maryland regulatory charge which its Delaware competition does not have to bear.[7]

There can in fairness be no doubt about these as the facts. The Secretary introduced absolutely no evidence which purported to contradict them. The opinion at one point characterizes the facts as "beyond dispute" (App. Petition 68a) and at another even obscurely recognizes what Lewes' evidence proved (App. Petition 76a).[8] Moreover, the Secretary made a Finding of Fact, No. 6, which could only have been premised upon Lewes' evidence —"Petitioner competes with several local unregulated dairies in Sussex and Kent Counties . . . in buying milk from producers and in selling bottled milk" (App. Petition 27a).

No more evidence has been required in other situations to disclose whether or not a trade barrier existed. The Secretary has frequently taken notice of trade barrier situations.[9] For example, in his decision leading to the

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7. These facts were, of course, shown in more detail. For example, the record discloses the identity of the seven to nine dairies which comprised Lewes' unregulated Delaware competition during the period involved (App. Below 143-145a), and shows that the Delaware farmer market is a "free, open" one in which Lewes "must pay at least as much to the downstate Delaware farmers for milk as the other downstate Delaware dairies must pay" (App. Below 137-138a, 143a, 158-159a, 405a).

8. In other places the opinion does suggest some doubt about the facts for reasons that cannot be valid. For example, it emphasizes that Lewes offered "only one witness," as though the number were significant (App. Petition 76a, 79-80a); moreover, it asserts that the "Secretary declined to give the uncorroborated testimony offered by Lewes the credence" given it by the District Court (App. Petition 80a), an assertion that is simply at odds with the record, as shown by the Finding of Fact of the Secretary mentioned above.

9. It is of interest that the Secretary's milk orders are founded on a plant rather than an entity basis, so that the tests for regulation apply only to a given plant; if they are met, the regulation extends only to that plant and not the entity. Although this does not help Lewes, it permits a large, multiple-plant dairy to accommodate to a regulated market by devoting one plant to that market and leaving the balance of its business unaffected by the regulation.

promulgation of this Maryland Order, the Secretary on a variety of occasions took notice of the fact, without more specifics, that full regulation places a dairy at "a serious competitive disadvantage" to the extent it does compete elsewhere with unregulated dairies (App. Below 15a).[10]

In *Lehigh*, moreover, there does not appear to have been specificity of the kind upon which the court below insists. In fact, when the Court there came to consider whether a disadvantage for the dairy involved necessarily or always existed in fact under the regulation attacked, it ruled: "Nor is the compensatory payment clause saved by the circumstance that in some instances it may also fortuitously operate to put the handlers . . . on a competitive par" (370 U. S. at 98).

Furthermore, no reason appears for requiring more specificity. The only more specific facts that could conceivably have been shown were the actual prices for which Lewes' unregulated Delaware competition purchased milk in Delaware over some period of time, as a comparison with Lewes' prices.[11] However, assuming that Lewes could feasibly have compiled such data,[12] they could hardly serve a purpose in connection with its legal argument.

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10. In deciding not to exclude Maryland's Eastern Shore from the regulated area, for instance, he observed, "the exclusion of the Eastern Shore area would place regulated Baltimore dealers at a serious competitive disadvantage with unregulated local dealers" (App. Below 15a), the very dilemma in which Lewes has been placed by including the Eastern Shore of Maryland and causing it to be fully regulated while it must still compete in Delaware with unregulated local dealers.

11. The opinion recognizes that when the Maryland Order went into effect—the critical point in time here—there was a "competitive Delaware price which was higher than the uniform blend prices subsequently established under the Order" (App. Petition 71a) and that Lewes was paying "the higher Delaware market price" (App. Petition 71a, n. 8).

12. In such an unregulated area the necessary records are not required to be kept. Even with records a precise price comparison

In one sense, the foundation for Lewes' argument has simply been the provision of the Order which requires that, as a consequence of shipping a portion of its production into Maryland, Lewes bear the Maryland regulatory charge on all its business; this requires, to use the language of *Lehigh*, "more of milk coming into a marketing area than that it 'comply with the same conditions which the farmers and distributors comply with in that region' " (370 U. S. at 92). After the case was remanded to the Department of Agriculture, Lewes did add to the record the proof that in fact it did not have some kind of shelter in Delaware which made it indifferent to the imposition of the regulatory charge on all its business, by showing that it primarily competed there in buying and selling with unregulated dairies which did not have to bear such a charge.

Once this was established, Lewes had shown all that its legal argument in any sense required. Its argument would remain the same even if it were shown that—for reasons of better credit, more convenient delivery arrangements, better customer relations, or any of the myriad considerations governing the relationship of buyer and seller —it could purchase from the farmers at a price somewhat less than its competition. To say in this context that there must still be specific price comparisons for Lewes' Delaware competition or other more specific evidence means, simply, that the existence of a prohibited economic trade barrier depends upon the precise over-all effect of the regulation on the dairy's business or some other effect of that kind. This inevtiably constitutes a substantive ruling, albeit

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would be complex, considering the necessity for adjustments for transportation, butterfat differentials, can versus bulk tank operations, etc. When in the administrative hearing the Secretary endeavored to submit some alleged statistics concerning an unregulated area, he was unable to prepare them in sufficient evidentiary form for the Hearing Examiner to admit them (see p. 18, *infra*).

indirect, that the statutory prohibition is something substantially different from what *Lehigh* suggested. *Lehigh* talked of economic trade barriers and rejected as irrelevant the possibility that a dairy might, "fortuitously", be able to surmount them.[13]

(c) *The opinion's deference to the Secretary's determination:* Finally, the opinion comes to lean heavily upon the Secretary's determination, again avoiding direct consideration of the substantive issue (App. Petition 85-87a).

This reliance is misplaced. The facts were not in issue. In the administrative hearing Lewes was foreclosed from examining the Secretary's expert, who was responsible for

13. Actually, if the requirement of more evidence in this instance were not of substantive significance, it would constitute a retroactive change in the ground rules upon which the administrative hearing itself proceeded. There, when Lewes chose in its case in chief to offer its evidence, through the testimony of a qualified witness, that the Delaware market was a free, competitive one, an objection was interposed on the grounds that the evidence "has to be specific" (App. Below 140-141a). Thereupon, Lewes stated and the Hearing Examiner ruled as follows (App. Below 142-143a):

> "[Counsel for Lewes:] Now if there is a real question about this, I should think that the Department would endeavor to show that in this hearing and if there is a real question, surprised as I might be, then we will endeavor in the light of that conflict to bring in more formidable evidence if there is any such, but I think it would be more confusing now, frankly, to come in with a long list of specific prices than helpful.
>
> "I think it is more meaningful to talk about the general session [sic] and then only if there is conflict, get into the minutia.
>
> "Examiner Holstein: Well, I have overruled the objection because I feel the evidence is admissible. If the evidence is challenged by the Government when it puts in its case, you, of course, Mr. Kirkpatrick, have the right to rebut in any way you see fit.
>
> "Go ahead."

The case which the Secretary subsequently put in included no challenge or contradiction of Lewes' testimony on the point, and the Secretary ultimately made his Finding No. 6 upon the basis of that testimony (see p. 14, *supra*).

the milk marketing order program, on the question of what was and was not a prohibited trade barrier, on the ground that this was "clearly a legal question" (App. Below 315a). In *Lehigh* this Court found the existence of such a barrier when in the administrative phase of the case the barrier point and the relevant statute had not even been discussed by the Secretary.

Furthermore, this reliance overlooks revealing qualities of the Secretary's determination. For example, the Secretary (App. Petition 34-35a)—and, independently, the Court of Appeals (App. Petition 87a)—considered as a factor that the regulatory technique here in question had long been in use. However, when the Secretary asserted this point before the District Court in this case, Lewes explained that its examination of the older milk orders cited by the Secretary showed that, on the contrary, they acually included provisions making accommodation for the very problem posed by Lewes. The District Court then afforded the Secretary an opportunity to refute Lewes' representation by furnishing to the Court copies of those orders. Tellingly, he let the opportunity to do so pass (App. Petition 56-57a, n. 6).

Furthermore, in making his decision the Secretary found it necessary to rely for certain purposes upon an exhibit of statistics which had been offered on his behalf but which for good reason had been rejected by the Hearing Examiner (App. Petition 48a, 20-21a). After the exhibit was offered, it was acknowledged to be incorrect in certain respects (App. Below 220-225a, 265-267a, 283a, 288a); indeed, it was ultimately conceded that it was not in fact compiled from the source from which it had purportedly come (App. Below 266-267a, 272-273a); and when Lewes endeavored to inquire what information did underlie the exhibit, the Secretary refused to divulge that information (App. Below 273-283a, 289a).

## CONCLUSION.

Not only does the opinion of the Court of Appeals decide the important trade barrier question, but it does so in a manner which overlooks the teaching of this Court in *Lehigh* and *Polar* and clouds analysis of that issue by reference to irrelevant considerations and misplaced administrative deference. A clear, conclusive determination of the question is needed. This petition for writ of certiorari should therefore be granted.

Respectfully submitted,

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# APPENDIX.

## RECOMMENDED DECISION.

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 127-1

On Remand

IN RE LEWES DAIRY, INC., *Petitioner*

PRELIMINARY STATEMENT

Petitioner is a handler under Milk Marketing Order No. 16 (7 CFR, Part 1016). This proceeding is the result of a mandate by the United States Court of Appeals for the Third Circuit [1] vacating an order by the United States District Court for the District of Delaware [2] and remanding the matter to the Secretary of Agriculture for administrative consideration and disposition of the issue as to whether the order imposes a trade barrier inconsistent with the provisions of section 8c(5)(G) of the Agricultural Adjustment Act of 1933, as amended and supplemented by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U. S. C. 601 *et seq.*), hereinafter called the act. The Judicial Officer ordered that the matter be referred to a hearing examiner in conformity with "the usual procedure under the act when order provisions are challenged as being 'not in accordance with law' ". *In re Lewes Dairy, Inc.*, 24 A. D. 242 (1965).

1. *Lewes Dairy, Inc. v. Freeman*, 337 F. 2d 827 (3rd Cir. 1964).

2. *Lewes Dairy, Inc. v. Freeman*, Civil Action No. 2353 (D. C. Del.), July 1, 1963.

The order in question [3] became fully effective February 1, 1960, upon issuance by the Secretary after notice and hearing and in accordance with the procedural steps specified in the Rules of Practice for the Formulation of Marketing Agreements and Orders (7 CFR, Part 900). It regulates the handling of milk in the Upper Chesapeake Bay Marketing Area, which includes Baltimore City and County and the counties adjacent thereto, all to the west of Chesapeake Bay, and also the nine Maryland counties on the eastern side of Chesapeake Bay. These latter counties, together with Sussex and Kent Counties in Delaware, which are immediately to the east, are commonly known as the Eastern Shore. The Delaware counties are not included within the regulated marketing area. Petitioner operates a milk plant in Lewes, Sussex County, Delaware, from which it distributes fluid milk in the Eastern Shore counties of Maryland and also in Kent and Sussex Counties, Delaware.

Shortly after the order became effective, its validity was challenged in a section 15-A proceeding instituted by several Eastern Shore Maryland and Delaware handlers, including petitioner, and the order was upheld by the Judicial Officer as a lawful exercise of the Secretary's authority. *In re Mills Dairy Products Company, et al.*, 20 A. D. 541 (1961). The Maryland handlers then sought judicial review under section 15-B of the act (7 U. S. C. 608c(15)(B)) in the United States District Court for the District of Maryland and the Delaware handlers sought similar review in the District Court for Delaware. The Maryland cases were heard and decided first and the Maryland District Court held the order invalid,[4] but the Court

3. The order was originally designated as Milk Marketing Order No. 127 but was later renumbered 16.

4. *Willow Farms Dairy, Inc. v. Freeman*, 206 F. S. 239 (1962).

of Appeals for the Fourth Circuit reversed and affirmed the Judicial Officer's decision. *United States v. Mills*, 315 F. 2d 828 (1963), rehearing denied, 317 F. 2d 764 (1963), certiorari denied, *Mills v. Freeman*, 374 U. S. 832.

Thereafter, in the Delaware action to which petitioner was a party, the United States District Court for the District of Delaware held the order invalid because it created a trade barrier in contravention of section 8c(5)(G) of the act, as interpreted by the Supreme Court in *Lehigh Valley Cooperative Farmers Inc. v. United States*, 370 U. S. 76 (1962). The decision of the District Court was vacated by the Court of Appeals for the Third Circuit and the matter remanded to the Secretary for administrative consideration and disposition of the trade barrier issue, which had not been raised or considered in the 15-A proceeding before the Secretary.[5]

The matter was referred to Benj. M. Holstein, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, and a pre-hearing conference was held in Baltimore on April 27, 1965, followed by a hearing in the same city on July 12 and 13, 1965, at which evidence was received. Andrew B. Kirkpatrick, Jr., of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, appeared as counsel for petitioner. Joseph A. Walsh, Office of the General Counsel, United States Department of Agriculture, represented respondent. After the hearing, proposed findings and conclusions and supporting briefs were submitted by each side.

## Findings of Fact.

1. Petitioner Lewes Dairy, Inc. is a corporation with its principal place of business at 660 Pilot Town Road, Lewes,

5. The decision in the administrative proceeding was issued June 14, 1961. The *Lehigh* case was decided June 4, 1962.

Sussex County, Delaware. Petitioner is a fully regulated handler under Federal Milk Marketing Order No. 16, with a pool plant at the above location, from which it distributes fluid milk to retail outlets in the Eastern Shore counties of Maryland and in Sussex and Kent Counties, Delaware (Tr. pp. 19-26).[6] Order No. 16 regulates the handling of milk in the Upper Chesapeake Bay Marketing Area, which includes the Eastern Shore counties of Maryland but does not include any part of Delaware (7 CFR 1016.1(c)).

2. Petitioner's utilization is substantially all Class I (Tr. p. 22). The quantity of Class I milk which petitioner distributes on routes within the marketing area in the Eastern Shore counties of Maryland is equivalent to between 40 and 60 per cent of its receipts of milk from dairy farmers or producers (Resp. Ex. 2, Table A).

3. Petitioner's regular and principal source of raw milk consists of Sussex and Kent County producers. Although the identity of some of these producers changes from time to time, the average number supplying petitioner at any given time is nine or ten. Petitioner purchases no milk from producers outside of Sussex and Kent Counties (Tr. pp. 27-29; Resp. Ex. 2, Table F). Petitioner also obtains additional supplies of milk when needed to balance or supplement its requirements, by purchases from Warner's Dairy, Red Lion, Pennsylvania. Such milk is not priced or pooled under any Federal or State regulation (Resp. Ex. 1). The quantity of such purchases varies substantially from month to month, and ranges from a minimum of 18 per cent to a maximum of 33 per cent of petitioner's total receipts of milk (Tr. pp. 29-33, 81; Resp. Ex. 1, Resp. Ex. 2, Table C).

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6. Unless otherwise noted, all findings will apply to the five-year period from February 1, 1960, when the order became effective, through December 1964, as well as to the situation at the time of hearing.

4. Prior to the effective date of the order, petitioner was paying its producers prices which were higher than the uniform minimum or blend prices subsequently established under the order. For sometime after February 1, 1960, when the order became effective, petitioner continued to pay such higher prices subject to an agreement by the producers to refund to petitioner all amounts in excess of the blend prices in the event that petitioner was not successful in its pending litigation challenging validity of the order. Since February 1963, petitioner has paid its producers only the blend prices required under the order (Tr. pp. 91-93, 113-116, 122).

5. During the four-year period from 1960 to 1963 (except for two months in 1961 and one month in 1962), petitioner paid \$4.00[7] for the milk purchased from Warner's Dairy, as described in Finding 3. During this period, the yearly average prices of Class I milk under Order No. 16 ranged between \$5.22 and \$5.40, and the yearly average blend prices ranged between \$4.52 and \$4.77 (Resp. Ex. 2, Table C, Note 1, Tables D, E). Prior to August 1964, that portion of the Warner purchases by petitioner which were allocated to Class I use under Order No. 16 were not subject to any compensatory payment. Beginning in August 1964, petitioner has paid into the producer settlement fund the difference between the Class I and the blend prices on all milk purchased from Warner and allocated to Class I use (Tr. pp. 114-115; 7 CFR 1016.70(e)(2), 1016.84).

6. Petitioner competes with several local unregulated dairies in Sussex and Kent Counties in buying milk from producers and in selling bottled milk (Tr. pp. 35, 43-49, 74-

7. All prices are per hundredweight and on the basis of 3.5 per cent butterfat content.

80). There is no evidence in the record as to the prices paid for milk or the other costs incurred by these local unregulated dairies. There are about 535 producers in Sussex and Kent Counties. Four hundred and thirty-five of such producers sell their milk to handlers regulated under the Philadelphia and New York-New Jersey orders, and the remaining 100 producers sell to local unregulated dairies (Tr. pp. 66-67).

7. The volume of producer receipts of milk by petitioner increased from 3,355,000 pounds in 1960 to 4,960,000 pounds in 1963. Its producer milk receipts in 1964 totaled 4,926,000 pounds (Resp. Ex. 2, Table C).

8. The volume of fluid milk products distributed in all areas by petitioner has increased each year from 4,972,000 pounds in 1960 to 6,918,000 pounds in 1964. Its volume of distribution of such products within the marketing area has remained at about two million pounds during this period, with a maximum of 2,300,000 pounds in 1964. Its volume of distribution of such products in Sussex and Kent Counties increased from 2,900,000 pounds in 1960 to 4,592,000 pounds in 1964 (Resp. Ex. 2, Table B).

## Conclusions.

Since petitioner distributes more than 10 per cent of its total receipts from producers as Class I milk on the Maryland Eastern Shore within the marketing area of Order No. 16, it is a fully regulated handler under that order and, as such, is subject to the pooling and pricing provisions of the order with respect to all the milk which it receives from producers, including that which it distributes in the unregulated areas of Delaware (7 CFR 1016.2(g)(1),

1016.3(b)(1)). It is petitioner's position that the payments which it is required to make as a fully regulated handler because of its business in Maryland places it at a competitive disadvantage with respect to its business in Delaware, where it must compete with unregulated milk dealers who are not required to make such payments. It contends that, under such circumstances, "the order penalizes a single-plant Class I handler, such as Lewes Dairy, Inc., for introducing some portion of its production into the regulated marketing area" and "creates a trade barrier" to such introduction in violation of section 8c(5)(G) of the act, as interpreted by the Supreme Court in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U. S. 76 (Petitioner's Brief, pp. 10-11, Petitioner's Reply Brief, pp. 12-13).

The section in question provides as follows:

> (G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area of the United States.

## I.

We do not agree that under the circumstances described Order No. 16 "prohibits" or "limits" the marketing of petitioner's milk in the regulated area of Maryland, thus creating a trade barrier in contravention of section 8c(5)(G), within the meaning of the *Lehigh* decision. In *Lehigh*, the sole question was the validity of the compensatory payment provision as it then existed in the New York-New Jersey order (7 CFR, Part 1002). Under this provision "outside" dealers, i.e., dealers or non-pool

handlers who were not fully regulated under the order because of their limited sales in the marketing area and who were free to purchase their milk at less than minimum order or blend prices, were required to pay into the pool, on all milk sold as Class I in the marketing area, the difference between Class I and surplus prices under the order, without regard to their actual cost for such milk. The Court held that, under the facts in the case, the effect of this provision was to make outside or non-pool milk more expensive and thus protect pool handlers in the marketing area from outside competition. This, the Court said, constituted a trade barrier prohibited by section 8c(5)(G).

It will be seen that the issue in the *Lehigh* case involved the right of an outside dealer not associated with the regulated area to compete in such area on equal terms with others doing business therein. In *Sterling Davis v. Freeman*, . . . F. S. . . . (D. C. N. J., 1965), 24 A. D. 1411, the Court stated: "It is to be noted that the crux of the *Lehigh* ruling rests in the actual discriminatory nature of the *rates* demanded of non-pool handlers introducing 'outside' area milk". There is no such issue in this proceeding. Lewes is not an outside dealer but a fully regulated handler associated with the Upper Chesapeake Bay Marketing Area by virtue of its substantial distribution in that area. The minimum order prices and the assessments and other obligations to which it is subject are identical with those imposed upon every other regulated handler in the area. Lewes does not claim otherwise. The contention that the order erects a trade barrier does not rest upon any alleged discrimination as between Lewes and other regulated handlers in Maryland, but upon the argument that, because of the payments it is required to make, Lewes finds itself at a disadvantage with respect to the unregulated dealers with whom it competes in Delaware and that this discourages Lewes from doing business in Maryland. In

short, Lewes complains because compliance with the order adversely affects its business in an unregulated area. No such question was raised or considered in *Lehigh*.

There is nothing in the *Lehigh* case to suggest that the difficulties encountered by a regulated handler in an unregulated area would constitute a trade barrier to the entry of the handler's milk in the regulated area. On the contrary, the Court disavowed any intent to consider the effect of full regulation upon one whose business was only partially within a marketing area and expressly limited its decision to the facts and the particular provision before it. The Court stated (370 U. S. 99): "Whether full regulation of the petitioners would be permissible under the Act is a question we need not reach in this case. If the Secretary chose to impose such regulation as a consequence of the handler's introduction of any milk into a marketing area, the validity of such a provision would involve considerations different than those now before us. With respect to these petitioners, however, and with regard to the regulation here in issue, we conclude that the action of the Secretary of Agriculture exceeded the powers entrusted to him by Congress." Accordingly, *Lehigh* cannot be considered as a precedent in support of Lewes' position in this proceeding.

Nor does the legislative history of section 8c(5)(G) support that position. The section in question was originally enacted as part of the amendments of 1935[8] when the marketing agreement and order provisions were added to the Agricultural Adjustment Act of 1933. It was included in the reenactment of 1937, which is the present Agricultural Marketing Agreement Act.

The section had its genesis in the mid-western states (Wisconsin, Iowa, Minnesota), which at that time manufactured about 45 per cent of the butter in the United States.

8. 49 Stat. 750.

The legislators from these states were concerned lest the authority in the act be used by the Secretary to "stop the free flow in commerce throughout the United States of dairy products". When Representative Andresen of Minnesota voiced this concern during the debate on the amendments of 1935, he was assured by Representative Jones, Chairman of the House Committee on Agriculture, that under the marketing order provisions the Secretary could do no more than require that milk coming into a marketing area "comply with the same conditions which the farmers and distributors comply with in that region". 79 Cong. Rec. 9462.

In short to clarify this intent, separate versions of what ultimately became section 8c(5)(G) were introduced in the House and Senate, after which the section in its present form was adopted by a conference committee. The conference report[9] stated as follows:

> . . . . The conference agreement retains the House provision with respect to prohibitions on marketing of both milk and products of milk. The conference agreement also denies the authority to limit in any manner the marketing in any area of milk products (butter, cheese, cream, etc.) produced anywhere in the United States. The language adopted by the conference agreement does not refer to milk, and so *does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk, etc.* (Emphasis supplied.)

Finally, when the conference agreement was considered on the floor of the House, the Chairman of the House Agriculture Committee stated:

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9. H. R. Rept. No. 1757. 74th Cong., 1st Sess. 21.

> Mr. Jones. . . . . Under the provisions of this bill if a price were fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in *he would be compelled to pay the producer the same price that was being paid the producers within the area and comply with all regulations and requirements of that area.* 79 Cong. Rec. 13022. (Emphasis supplied.)

It is evident that the intent of section 8c(5)(G) was simply to make sure that milk brought into a marketing area from outside of the area would not be subject to greater restrictions or limitations than were applied to milk within the area. Order No. 16 compels Lewes "to pay the producer the same price that [is] being paid the producers within the [Upper Chesapeake Bay] area and comply with all regulations and requirements of that area". It does no more.

The Court in *Lehigh* reviewed the legislative history of section 8c(5)(G) in detail, and concluded that it was intended to prohibit "not merely . . . . absolute or quota physical restrictions, but also . . . . economic trade barriers of the kind effected by the subsidies called for by this 'compensatory payment' provision".[10] Petitioner equates such restrictions with the competitive disadvantages which a fully regulated handler may face in an unregulated area. In view of the complete absence of anything in the legislative history to justify such an analogy, it must be rejected as not within the intent of the Congress and therefore not a reasonable interpretation of section 8c(5)(G).

The question presented by the facts in this proceeding is simply whether a milk marketing order may subject a handler who does only part of his business in the market-

10. 370 U. S. 97.

ing area to the pricing requirements of the order on all of his producer milk purchases, including those not intended for distribution in the marketing area. This question was answered in the affirmative in *Titusville Dairy Products Company v. Brannan*, 176 F. 2d 332 (3rd Cir. 1949), certiorari denied, 338 U. S. 905. In that case, the United States Court of Appeals for the Third Circuit held that a Pennsylvania milk company which was classified as a fully regulated handler under the New York order because it had a permit from the New York health authorities to sell milk in New York, was subject to the minimum pricing provisions of the New York Order on all of its milk purchases, including those made during a period when it had no shipments into New York. The same question was presented to the Judicial Officer in at least two subsequent proceedings and answered in the same way. *In re Terrace Park Dairy et al.*, 12 A. D. 1383 (1953); *In re Paul Wilkinson*, 21 A. D. 203 (1962). In each of these proceedings, the Judicial Officer cited the *Titusville* case and observed: ". . . . the Secretary may, in prescribing the pricing provisions of an order, provide for minimum prices on all milk received at a handler's plant 'whether or not the area eventually consumed the milk' ". 12 A. D. 1395, 21 A. D. 210.

During the five years from 1960 through 1964, petitioner sold almost one-half (48.60%) of its producer receipts within the marketing area of Order 16. Its reported distribution in 1964, the last year for which figures are available, was 47.21 per cent (Resp. Ex. 2, Table A). Its association and the association of its producers with the regulated area of Maryland is obviously substantial and of much greater significance than that of the Pennsylvania handler in *Titusville* to the New York market.

Petitioner asserts, without elaboration, that the *Titusville* case was overruled *sub silentio* by *Lehigh* (Petitioner's

Reply Brief, p. 12). If so, the *Lehigh* decision would require changes in the existing pattern of federal milk regulation greater than those brought about by the Court's invalidation of the challenged compensatory payment provision, and this would result not from anything the Court said but, accordingly to petitioner, from what was implied. Even without the Court's express disclaimer of any intent to consider full regulation, petitioner's contention could not be seriously entertained. The *Titusville* decision must be regarded as the controlling precedent for this proceeding.

For the past 25 years, milk marketing orders have provided for the payment of minimum prices on all producer milk received by fully regulated handlers regardless of where such milk is sold, and each of the approximately 75 outstanding orders contains such a requirement. After the *Butler* decision in 1937,[11] when the marketing order provisions of the Agricultural Adjustment Act were reenacted as the Agricultural Marketing Agreement Act[12] the reenactment "expressly ratified, legalized and confirmed,"[13] existing marketing agreements and orders of the Secretary of Agriculture, each of which then contained such pricing requirements.[14] Significantly, the reenactment also included section 8c(5)(G) which is a decisive indication that the Congress did not intend this section to prohibit the pricing of outside area milk.

## II

Assuming *arguendo* that petitioner's position is legally sound, petitioner has nevertheless failed to adduce facts

11. *United States v. Butler*, 297 U. S. 1.

12. 50 Stat. 246 *et seq.*; 7 U. S. C. 601 *et seq.*

13. Act of June 3, 1937, c. 296, Sec. 4; 50 Stat. 249.

14. There were five such orders in effect at that time, regulating the handling of milk in the St. Louis, Missouri, Greater Boston, Fall River and Rhode Island, Dubuque, Iowa, and Kansas City, Missouri marketing areas—Marketing Orders No. 3, 4, 5, 12 and 13, respectively.

which would entitle it to prevail, i.e., it has not proved any actual competitive disadvantage in connection with its operations in Delaware, as distinguished from mere allegations of such disadvantage.

W. Weldon Brittingham, Treasurer of Lewes Dairy, Inc., was petitioner's only witness. After describing petitioner's operations generally, he testified that its regular supply of milk comes from nine or ten Sussex and Kent County producers (Tr. pp. 27, 64), supplemented by purchases as needed from Warner's Dairy at Red Lion, Pennsylvania (Tr. pp. 29-33, 81); and that there are between five and six hundred producers in Sussex and Kent Counties, of which number about 100 sell to local dairies and the rest to handlers regulated by other marketing orders (Tr. pp. 66-67). The witness named several local dairies with which Lewes competes in buying from producers and in selling bottled milk (Tr. pp. 35, 43-59), and testified that he knew what prices these dairies pay to their producers but could not state what those prices are (Tr. pp. 36-38, 72). He testified that Lewes has to pay competitive prices to producers (Tr. p. 43); that it also has to be competitive in selling milk (Tr. p. 62); and that the order forces it to pay more for milk than its competitors pay (Tr. p. 63).

The witness also stated that for some time after February 1, 1960, when the order became effective, Lewes paid its producers prices higher than the blend prices, which payments were subject to the agreement described in Finding 4, but that since 1963 it has paid its producers only the required minimum or blend prices; that such prices are lower than the "going" prices paid by other dealers; that unless petitioners' prices to its producers are increased the producers will sell their milk elsewhere; and that petitioner has tried to take on additional producers but has been unsuccessful because of this price situation (Tr. pp. 74, 108-115, 118-120, 126-130). The witness also testified

that he did not know how much Lewes was paying for the milk which it bought from Warner's Dairy, except that at times the price had been as high as $7.00 (Tr. pp. 8-82, 122).

This is substantially all of the evidence which could be construed as designed to show that petitioner operates at a competitive disadvantage in Delaware by reason of its compliance with Order No. 16. Petitioner offered no documentary evidence, nor did its witness testify as to the specific prices paid at any time by any of the local dairies which the witness named as Lewes' competitors, nor did it call any producer witnesses.

Petitioner's case is based solely on its alleged inability to meet competition from unregulated dealers in Delaware (Tr. pp. 8-9). It asserts (Petitioner's Reply Brief, p. 9): "Petitioner's point is that the order necessarily increases its costs for milk, at least by the amount of the payments it must make to the Market Administrator, and that such a charge creates a trade barrier when . . . the charge is applied to the milk it sells outside the regulated area in competition with others who do not have to bear it". We read this to mean that the charge or charges which petitioner must bear, to the exclusion of its unregulated competitors, increase its total costs for milk to the point where these costs exceed the total costs of such competitors. Unless this is so, of course, petitioner does not suffer any competitive disadvantage. But petitioner offered no evidence as to the prices paid or other costs incurred by its competitors, and there is accordingly no basis upon which we can compare costs or conclude that petitioner's costs are greater, as asserted by its witness (Tr. 63).

And although the witness claimed difficulty in purchasing producer milk because of petitioner's lower prices to producers since 1963, the record shows that petitioner's producer receipts during 1963 and 1964 increased sub-

stantially over the previous three years (Tr. pp. 118-120; Resp. Ex. 2, Tables C. F).

According to petitioner's own statement of the issue in this proceeding, we should be concerned only with its unregulated Delaware competition. Accordingly, there would appear to be some question as to the relevance of petitioner's dealings with Warner's Dairy of Red Lion, Pennsylvania, which is not in that category. Petitioner does not claim that the order affects it adversely with respect to such purchases. However, there is a substantial amount of evidence in the record and discussion in the briefs concerning petitioner's purchases from this source, and assuming *arguendo* that such purchases are relevant, it is clear that they do not represent a disadvantage to petitioner. More than one-fourth of petitioner's total receipts of milk and milk products over a five year period came from Warner and, with minor exceptions, was brought at prices substantially below Order 16 blend prices. All but a small portion of this milk was sold by petitioner as Class I (Tr. p. 121; Resp. Ex. 2, Tables C, D, E).

Petitioner protests that the $4.00 price to Warner does not represent petitioner's total cost because of the cost of hauling from Red Lion, Pennsylvania, which is at petitioner's expense (Petitioner's Reply Brief, p. 4). But although petitioner's witness testified as to the purchases from Warner, no evidence was offered as to petitioner's hauling costs of any other costs, or indeed as to the prices paid to Warner by petitioner. The witness could not state what those prices were. They were later established by respondent's exhibits, which are based upon petitioner's reports to the Market Administrator.

Petitioner has the burden of proof in a 15-A proceeding. *Bailey Farm Dairy v. Jones*, 61 F. S. 209, 217 (D. C. E. D. Mo., 1945), affirmed 157 F. 2d 87 (8th Cir. 1946), certiorari denied, 329 U. S. 788; *Boonville Farms*

*Cooperative v. Freeman*, 23 A. D. 1330 (D. C. N. D. N. Y., 1964). It was therefore incumbent upon petitioner to show factually that it costs for milk exceed the costs of its unregulated competition, as it claims. "Controlling case law . . . imposes the burden of demonstrating an actual economic barrier in the operation of the challenged section. Hence, the mere allegation of such marketing effect will not suffice to invalidate § 1002.43. The [challenged provision] must be proven discriminatory within the meaning of *Lehigh*." *Sterling Davis Dairy v. Freeman*, 24 A. D. 1411, 1418 (D. C. N. J., 1965), citing *United States v. Rock Royal Coop.*, 307 U. S. 533, 567-568, and *United States v. Lewes Dairy, Inc.*, 337 F. 2d 827, 829 (3rd Cir. 1964).

And in the Maryland District Court proceeding (*supra*, note 4), where the Maryland handlers were contesting the order in question, the District Court refused to apply the *Lehigh* decision because the handlers "have not shown how they are hurt" by the Order 16 provision there alleged to be discriminatory, 206 F. S. at p. 257.

So here the challenged provisions of the order cannot be shown to be discriminatory or to constitute a trade barrier by "mere allegation of similar marketing effect" to that of the compensatory payment provision outlawed in *Lehigh*. What Lewes has presented in support of its position in this proceeding is argument and analogy, and this is not enough. As a first step at least, it was up to Lewes to show that the cost disadvantage which it claims and upon which its attack is based does in fact exist. This could be done only by comparing Lewes' costs with those of its unregulated competitors which, of course, required specific cost figures. Petitioner presented no such figures either for itself or for its competitors. Nor did it call any producer witnesses to substantiate the allegation that its producers could obtain more for their milk elsewhere

than petitioner was paying and that they would leave petitioner unless it increased producer prices. In short, petitioner has failed to prove that it suffers any competitive disadvantage by reason of the order.

Although petitioner's failure to establish any actual competitive disadvantage would require dismissal of this petition without more, the evidence submitted by respondent proves that petitioner does not suffer any competitive disadvantage because of the order. We need not review that evidence in detail. It shows that petitioner's volume of distribution of milk products in and out of the area has increased substantially each year since inception of the order in 1960, and that petitioner enjoyed a particularly large volume increase in 1964, during a period when petitioner paid its producers no more than the minimum blend prices required by the order (Resp. Ex. 2, Table B). The evidence also shows that the volume of petitioner's distribution of producer milk in the regulated area has not diminished since the order became effective, and that its producer receipts have increased substantially since that time (Resp. Ex. 2, Tables A, C). It shows further that petitioner's purchases from Warner's Dairy during 1964 were greater than at any time since the order became effective, and that these purchases were substantially all made at prices below Order 16 blend prices (Resp. Ex. 2, Table C; Finding 5). The only reasonable conclusion is that petitioner's business is not being adversely affected by the order, either in the marketing area or in Delaware.

Herbert L. Forest, Director of the Dairy Division, Consumer and Marketing Service, United States Department of Agriculture, testified as an expert for respondent and described the factors which are taken into account in establishing the geographical limits of a marketing area. He

explained why it is administratively necessary to apply the pooling and pricing provisions of an order to all producer milk received at a plant without regard to its ultimate destination or disposition, and stated that regulation on this basis is necessary to assure the full benefits of the act to producers. He enumerated the reasons why segregation and different treatment of the milk distributed in a marketing area from that not so distributed would not be administratively practicable and would deprive producers of the full protection which the act contemplates (Tr. pp. 264-272, 276-278, 283, 294, 308, 311-316, 322-324, 334).

Petitioner suggests, in effect, that these reasons are not persuasive, that other methods of regulation are available, and that the Upper Chesapeake Bay Order would work as well if the pooling and pricing provisions were fully applied only to such milk as is distributed within the marketing area. But assuming *arguendo* that the petitioner is correct in this regard, the question is one of choosing administrative alternatives—a question which is not cognizable in a 15(A) proceeding. We are not concerned with the wisdom of the regulation but only with its legality. "Error or unwisdom is not equivalent to abuse." *American Telephone and Telegraph Company v. United States*, 299 U. S. 232, 236-237. The fact that there may exist other regulatory approaches which might be less burdensome or expensive to petitioner does not make the challenged regulation unlawful. Such matters may be considered only in an amendment hearing, at which all interested handlers and producers would have a right to be heard.

A milk marketing order is *per se* a limitation on distribution under the free enterprise system, and necessarily involves restraints which may sometimes apply with less than complete equity. "Of course, there may be some

resultant damage to a handler or producer in the enforcement of the Act, but this lack of perfection does not destroy the validity of the Order. . . . Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete equality, for the variables are too numerous', he 'fulfills his role when he makes a reasoned' Order." *United States v. Mills et al.*, 315 F. 2d 828, 838.

At the hearing, respondent offered a tabulation which purports to show increased sales of fluid milk in Sussex and Kent Counties since the inception of Order 16, by fully regulated Order 16 handlers other than Lewes and by fully regulated handlers under various other federal orders (Resp. Ex. 2, Table H). Petitioner objected to this tabulation because respondent refused to make available for use in cross-examination the underlying data from which the tabulation was prepared. Respondent maintains that the information was confidential and could not be disclosed (Tr. pp. 238-250). The objection was overruled and the tabulation received in evidence with the understanding that respondents failure to furnish the data would be a factor in determining what consideration should be given to the document.

It is felt that the tabulation should be given no consideration for several reasons. The purpose of the tabulation is to show that other regulated handlers have had no difficulty in coping with unregulated competition in Delaware (Resp. Brief, pp. 17-20), from which, we presume, respondent would draw the inference that the petitioner should have no such difficulty. But the document is inconclusive for this purpose, because the fact that other regulated handlers have been able to compete with unregulated dealers does not necessarily mean that petitioner could do so. And in any event, it was not up to

respondent to establish that petitioner can compete, but up to petitioner to establish that it can not.

Finally, failure to make the basic data available to petitioner for use in cross-examination raises serious legal doubts as to whether the tabulation may be given any consideration. *Wirtz v. Baldor Electric Company*, 337 F. 2d 518, 528-529 (D. C. Cir. 1963). Because the document is legally questionable and inconclusive, and since it is superfluous in any event, we have excluded it in arriving at the conclusions expressed herein.

It is concluded that the pricing provisions of Order No. 16 may be lawfully applied to all of petitioner's producer milk, and that any disadvantage which petitioner may encounter in competition with unregulated dealers in unregulated areas by reason of petitioner's compliance with such provisions, does not constitute a trade barrier under section 8c(5)(G) to the entry of petitioner's milk into the regulated area. To the extent that such disadvantage may exist, it is a necessary concomitant of the restrictions and limitations which may lawfully be imposed and which are inherent in any order regulating the distribution of milk in a geographically defined marketing area.

It is further concluded that petitioner has not proved that its compliance with Order No. 16 places it at a disadvantage in relation to the unregulated dealers with whom petitioner competes in Sussex and Kent Counties, Delaware.

All contentions of petitioner, whether or not specifically noted herein, have been considered and it is concluded that the petition should be dismissed.

ORDER.

The petition is dismissed.

NOTE: The foregoing is a recommended decision. It is not a final order. The final order will be issued by the Judicial Officer after the parties have had opportunity to file exceptions, etc., as provided by the rules of practice.

BENJ. M. HOLSTEIN,
Benj. M. Holstein,
*Hearing Examiner.*

April 6, 1966

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 127-1

[Reported at 25 Agriculture Decisions 709]

IN RE LEWES DAIRY, INC., *Petitioner*

## DECISION AND ORDER ON REMAND.

### PRELIMINARY STATEMENT.

This is a proceeding under section 8c(15)(A) of the Agricultural Adjustment Act (1933), as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U. S. C. 601 *et seq.*), involving the validity of Order No. 16, as amended, issued under the act and regulating the handling of milk in the Upper Chesapeake Bay marketing area,[1] which proceeding was before us earlier. See *In re Mills Dairy Products Company et al.*, 20 A. D. 541 (1961).

Shortly after Order No. 16 became effective, its validity was challenged in this proceeding instituted by several regulated handlers thereunder, including petitioner, located on the Eastern Shore of the State of Maryland and in the State of Delaware. The order was upheld in this proceeding (*In re Mills Dairy Products Company et al., supra*), and upon appeal therefrom by the handlers located in the State of Maryland. *United States v. Howeth M. Mills et al.*, 315 F. 2d 828 (4th Cir. 1963), rehearing denied, 317 F. 2d 764 (4th Cir. 1963), *cert. denied*, 375 U. S. 819 (1963).

1. The order regulating the handling of milk in the Upper Chesapeake Bay marketing area was originally numbered Order No. 127. Effective January 1, 1962, Order No. 127 was renumbered as Order No. 16 (26 F. R. 12752), and shall be referred to herein by its new designation.

Thereafter, the United States District Court for the District of Delaware, in an appeal from our decision in this proceeding brought by regulated handlers located in the State of Delaware, including petitioner, held that Order No. 16 was invalid because it created a "trade barrier" in contravention of section 8c(5)(G) of the act, as interpreted by the United States Supreme Court in *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. 76 (1962).[2] That decision was vacated by the United States Court of Appeals for the Third Circuit in *United States v. Lewes Dairy, Inc. et al.,* 337 F. 2d 827 (3d Cir. 1964), *cert. denied,* 379 U. S. 1000 (1965), and the matter was remanded to the Secretary for administrative consideration and disposition of the "trade barrier" issue, which had not been developed or considered earlier in this proceeding.[3]

Upon remand, the matter was referred to Benj. M. Holstein, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, and a prehearing conference was held in Baltimore, Maryland, April 27, 1965, followed by a hearing there July 12 and 13, 1965. At the hearing, petitioner was represented by Andrew B. Kirkpatrick, Jr., of Morris, Nichols, Arsht & Tunnell, Attorneys at Law, Wilmington, Delaware, and Joseph A. Walsh, Office of the General Counsel, United States Department of Agriculture, represented respondent. After the hearing, the parties filed briefs. On April 6, 1966, the hearing examiner filed a report recommending that the petition be dismissed. Petitioner filed exceptions to the hearing examiner's report.

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2. Lewes Dairy, Inc. v. Freeman (D. Del. July 1, 1963).

3. The decision in the administration proceeding was issued June 14, 1961. The *Lehigh* case was decided June 4, 1962.

FINDINGS OF FACT.

1. Petitioner, Lewes Dairy, Inc., is a corporation organized and existing under the law of the State of Delaware with its principal place of business at 660 Pilot Town Road, Lewes, Sussex County, Delaware. Petitioner is a handler fully regulated under Order No. 16, as amended, issued under the act and regulating the handling of milk in the Upper Chesapeake Bay marketing area. Petitioner operates a pool plant under the order, at the above location, which is its only plant and from which it distributes fluid milk to retail outlets in the Eastern Shore counties of Maryland and in Sussex and Kent Counties, Delaware.[4]

2. Petitioner's utilization of milk is substantially all Class I or fluid utilization. The quantity of Class I milk which petitioner distributes on routes within the marketing area in the Eastern Shore counties of Maryland is equivalent on an annual basis to between 40 and 61 percent of its receipts of milk from dairy farmers or producers.

3. Petitioner's regular and principal source of raw milk is from producers located in Sussez and Kent Counties, Delaware. Although some of these producers change from time to time, on the average, 9 or 10 producers supply petitioner with milk at any given time. Petitioner purchases no milk from producers outside of Sussex and Kent Counties. Petitioner also obtains additional supplies of milk when needed to balance or supplement its requirements by purchases from Warner's Dairy, Red Lion, Pennsylvania. This milk is not fully regulated, *i.e.*, priced, under

4. Unless otherwise noted, all findings apply to the five-year period from February 1, 1960, when the order became effective, through December 1964, as well as to the situation at the time of hearing.

any Federal or State regulation. The quantity of such purchases varies substantially from month to month, and ranges on an annual basis from a minimum of 18 percent to a maximum of 33 percent of petitioner's total receipts of milk.

4. Prior to the effective date of the order, petitioner was paying its producers prices which were higher than the uniform or blend prices subsequently established under the order. For some time after February 1, 1960, when the order became effective, petitioner continued to pay such higher prices subject to an agreement by the producers to refund to petitioner all amounts in excess of the blend prices in the event that petitioner was not successful in its pending litigation challenging the validity of the order. Since February 1963, petitioner has paid its producers only the minimum blend prices required under the order.

5. During the four-year period from 1960 to 1963 (except for two months in 1961 and one month in 1962), petitioner paid $4.00[5] for the milk purchased from Warner's Dairy, as described in Finding of Fact 3. During this period, the yearly weighted average Class I price under Order No. 16 ranged between $5.22 and $5.40, and the yearly average blend price under the order ranged between $4.52 and $4.77. Prior to August 1964, petitioner paid no compensatory payments on that portion of its purchases of milk from Warner's Dairy which were allocated to Class I use under Order No. 16. Beginning in August 1964, petitioner has paid into the producer-settlement fund under the order the difference between the order Class I and the blend prices on all milk purchased from Warner's Dairy and allocated to Class I use.

5. All prices are per hundredweight and on the basis of 3.5 percent butterfat content.

6. Petitioner competes with several local unregulated dairies in Sussex and Kent Counties and with handlers regulated under other Federal milk orders in buying milk from producers and in selling bottled milk. There is no evidence in the record as to the actual prices paid for milk or the other costs incurred by these local unregulated dairies. There are about 535 milk producers in Sussex and Kent Counties. Four hundred and thirty-five of these producers sell their milk to handlers regulated under the Delaware Valley (formerly the Philadelphia and Wilmington orders) and New York-New Jersey orders, and the remaining 100 producers sell to local unregulated dairies.

7. The volume of producer receipts of milk by petitioner increased from 3,355,000 pounds in 1960 to 4,960,000 pounds in 1963. Its producer milk receipts in 1964 totaled 4,926,000 pounds.

8. The volume of fluid milk products distributed in all areas by petitioner has increased each year from 4,972,000 pounds in 1960 to 6,918,000 pounds in 1964. Its volume of distribution of such products within the marketing area has remained at about two million pounds during this period, with a maximum of 2,300,000 pounds in 1964. Its volume of distribution of such products in Sussex and Kent Counties increased from 2,900,000 pounds in 1960 to 4,592,000 pounds in 1964.

## Conclusions.

### I.

It should be stated herein at the outset, as we have stated many times, that the applicable statutory provisions afford a means for adjudicating whether an order, a provision thereof, or an obligation imposed in connection

therewith is "not in accordance with law" (7 U. S. C. 608c (15)(A)). Our inquiry in this proceeding does not encompass questions of policy, desirability, or the evaluation of the effectiveness of economic and marketing regulations promulgated pursuant to the act. See, *e.g.*, *United States v. Howeth M. Mills et al.*, 315 F. 2d 828 (4th Cir. 1963), *cert. denied*, 374 U. S. 832, 375 U. S. 819 (1963); *In re Charles P. Mosby, Jr., d/b/a Cedar Grove Farms*, 16 A. D. 1209, 1220 (1957), *aff'd* S. D. Miss. Jan. 5, 1959; *In re Clover Leaf Dairy Company*, 15 A. D. 339 (1956), *aff'd* N. D. Ind. Sept. 10, 1958; *In re Roberts Dairy Company*, 4 A. D. 84 (1945). Cf. *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 182 (1935).

## II.

Petitioner is a fully regulated handler under the disputed order and distributes a substantial volume of milk, both in absolute terms and as a percentage of its producer milk receipts, in the marketing area as defined therein. At this stage of the proceeding, petitioner is not challenging those provisions of the order which define the marketing area or petitioner's plant as a pool plant thereunder.[6] Cf. *In re Mills Dairy Products Company et al.*, 20 A. D. 541 (1961), and *In re Willow Farms Dairy, Inc.*, 20 A. D. 810 (1961), both affirmed, *United States v. Howeth M. Mills*

6. In addition, petitioner has not alleged, argued or proved that the order is not supported by substantial evidence in the promulgation hearing record. Consequently, the order in general and the sections thereof in issue are supported by the presumption, which has not been overcome by petitioner, that there are facts in existence which justify the order provisions. See, *e.g.*, *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U. S. 194, 209 (1934); *Pacific States Box & Basket Co. v. White*, 296 U. S. 176, 185 (1935); *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533, 567 (1939). We are not, therefore, concerned with the question of substantiality of evidence in consideration of petitioner's allegations of substantive invalidity.

*et al., supra.* Nor could petitioner well do so. *United States v. Howeth M. Mills et al., supra.*

Section 8c(1) of the act (7 U. S. C. 608c(1)) provides generally that the Secretary shall issue orders applicable to processors, associations of producers, and others engaged in the handling of milk or its products, such persons to be referred to as "handlers". This section does not specify which handlers out of this general group are to be regulated by an order. However, section 8c(10) of the act (7 U. S. C. 608c(10)) states that a marketing order shall be applicable only to persons in the respective classes of industrial or commercial activity" specified in a marketing agreement upon which a hearing has been held. Section 8c(11) authorizes separate orders for separate marketing areas, which orders shall, insofar as practicable, contain such different terms applicable to the several marketing areas as the Secretary finds necessary to give due recognition to the differences between the areas (7 U. S. C. 608c(11)).

These sections of the act, taken together, authorize the Secretary to issue marketing orders applicable to particular classes or groups of handlers in some way associated with a given marketing area. The Secretary may determine which handlers and which milk handling are to be regulated by a particular order, *i.e.*, determine the coverage of that order. In order words, the Secretary in promulgating a milk marketing order, must determine which handling of milk shall be isolated for the purpose of regulation. See, *e.g., United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533 (1939); *In re Willow Farms Dairy, Inc., supra*, at pp. 818-19; *In re Clover Leaf Dairy Company et al., supra; In re Tapor Dairies Company*, 14 A. D. 77 (1955), *aff'd*, N. D. Ohio, Jan. 10 and Apr. 11, 1958. Appropriate standards may be prescribed to designate the dairy

farmers or "producers" whose milk is subject to the classification, pricing and pooling provisions of an order. Cf. *United States v. Wrightwood Dairy Co.*, 127 F. 2d 907, 911 (7th Cir. 1942); *Vogt's Dairies, Inc. v. Wickard*, 45 F. Supp. 94 (S. D. N. Y. 1942).

As stated above, petitioner distributes a substantial volume of milk, both in absolute terms and as a percentage of its producer milk receipts, in the marketing area established under the contested order. Such fact is amply supported by this record and the record of the promulgation or rule-making hearing upon which the order is based. (See also Finding of Fact 2.) Such distribution evidences a *substantial connection* by petitioner with the market, warranting the regulation of petitioner under the disputed order. Also, pool plant qualification on a percentage basis as adopted in the contested order rather than total plant volume insures that only handlers primarily and substantially associated with distribution in the marketing area will be regulated by the marketing order. Moreover, practically every marketwide pooling order which has been the subject of litigation in the courts has provided for pool qualification on a percentage-of-shipment basis, and at no time has it been held that such standard was an unreasonable or inappropriate method of designating the plants that would be subject to regulation under the order. See, *e.g.*, *United States v. Howeth M. Mills et al.*, *supra*.

"The background and legislative history of the Agricultural Marketing Agreement Act of 1937, as amended, leaves no doubt that Congress gave the Secretary broad discretion in its administration." *Queensboro Farms Products, Inc. v. Wickard*, 137 F. 2d 969 977 (2d Cir. 1943). The "terms of the Order are largely matters of administrative discretion" and the technical details "are left to the Secretary and his aides." *Stark v. Wickard*, 321 U. S. 288,

310 (1944). The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters for administrative competence. *American Power & Light Co. v. Securities and Exchange Commission*, 329 U. S. 90, 112 (1946); *Secretary of Agriculaure v. Central Roy Refining Co.*, 338 U. S. 604, 610-14 (1950). It is concluded that the formula employed by the Secretary to ascertain which milk handling was to be regulated by the contested order constituted a valid and reasonable exercise of administrative discretion reflecting the conditions prevailing in the regulated market and petitioner does not contest this conclusion. Cf., *e.g.*, *In re Willow Farms Dairy, Inc., supra; In re Tapor Dairies Company, et al., supra; In re Avon Dairy et al.*, 6 A. D. 885 (1947); *aff'd, Balazs et al. v. Brannan*, 87 F. Supp. 119 (N. D. Ohio 1949). In other words, the Secretary could clearly determine, in effect, that petitioner was sufficiently connected or associated with the proposed market on the basis of the evidence in the promulgation record as to require its regulation thereunder.

Further, sections 8c(5) and 8c(7) of the act (7 U. S. C. 608c(5) and (7)) specify how the milk handling selected for regulation under sections 8c(1), 8c(10) and 8c(11) is to be regulated, that is, the terms of the order which shall be applicable to the handlers thus selected for regulation. Under section 8c(5)(A), only the milk received by regulated handlers is to be classified and only regulated handlers must pay producers delivering milk to them the prices specified in sections 8c(5)(A) and (B). Moreover, such sections patently authorize the minimum pricing of all milk received by handlers from producers under an order issued pursuant to the act.[7]

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7. Sections 8c(5)(A) and (B) of the act read, in pertinent part, as follows:

> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms

Petitioner's *sole* allegation of order invalidity herein relates to the pricing and pooling under Order No. 16 of the milk it distributes *outside* of the marketing area in Delaware and the claimed basis of, or reason for, invalidity is limited to the alleged creation of an unlawful "trade barrier" by reason of such pricing and pooling contrary to the prohibition contained in section 8c(5)(G) of the act (7 U. S. C. 608c(5)(G)),[8] as construed in *Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U. S. 76 (1962). In other words, petitioner argues that the payments it is required to make into the producer-settlement fund under the order as a fully regulated handler on all its milk received from producers wherever sold places it *at such* a competitive disadvantage in connection with the milk it sells outside of the marketing area in Delaware where

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and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers...

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them . . .

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered . . . .

8. Section 8c(5)(G) reads as follows:

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

it competes with unregulated milk dealers as to constitute a "trade barrier" to its sales of milk in the marketing area.

As stated above, the act in sections 8c(5)(A) and (B) thereof clearly authorizes, in an order issued thereunder, the regulation of the handling of a regulated handler's total milk supply from producers, that is, the minimum pricing of all milk received from producers. See also, *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3d Cir. 1949), *cert. denied*, 338 U. S. 905 (1949); *In re Terrace Park Dairy et al.*, 12 A. D. 1383 (1953); *In re Paul, Robert, and Charles Wilkinson, d/b/a Hillside Farms Dairy*, 21 A. D. 203 (1962). In *Titusville*, the United States Court of Appeals for the Third Circuit held that a milk company located in Pennsylvania, which was a fully regulated handler under the order regulating the handling of milk in the New York metropolitan marketing area because it had a permit from the New York City Health Department to sell milk there, was subject to the minimum pricing provisions of such order on *all* its producer milk receipts even though it distributed *no* milk in the marketing area during part of the period involved. Petitioner contends, however, that *Titusville* was reversed by the Court's decision in *Lehigh*. Such is not the case.

The Supreme Court held in *Lehigh* that certain compensatory payment provisions of the New York-New Jersey milk marketing order were invalid and not in accordance with law insofar as such provisions required a compensatory payment measured by the difference between the Class III and Class I prices under such order to the producer-settlement fund by a handler operating a *nonpool* or *unregulated* plant on Class I milk distributed *within* the marketing area thereunder from such nonpool plant, in that such provisions and the payments resulting therefrom, in effect, constituted "trade barriers" inconsistent with the policy expressed by

Congress in section 8c(5)(G) of the act. The Court did not thereby strike down all compensatory payments, only found the rate of payment involved therein to be invalid and was not faced with and did not determine by any stretch of the imagination the issue decided in *Titusville.*

In fact, when presented, in effect, with the argument that the compensatory payments there in issue were valid in that the partially regulated handlers required to make such payments under the New York-New Jersey order, could have been fully regulated under such order [9] the Court stated "Whether full regulation of the petitioners would be permissible under the Act is a question which we need not reach in this case. If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, the validity of such a provision would involve *considerations different from those now before us.*" (Emphasis supplied.) *Lehigh Valley Cooperative Farmers, Inc. v. United States, supra,* at p. 99.[10]

Moreover, that section 8c(5)(G) of the act does not apply to the *Titusville* question, that is, minimum pricing of *regulated* milk wherever sold, is seen from the legislative history thereof.[11] Basically, such provision was enacted, in

9. Such partially regulated handlers distributed a much smaller percentage of producer milk receipts, that is, less than 10 percent, in the New York-New Jersey marketing area than petitioner distributes in the marketing area involved herein (see Finding of Fact 2).

10. Of course, as indicated above, petitioner has presented for determination herein no considerations different from those involved in *Lehigh.*

11. Also, for the past 25 years, milk marketing orders have provided for the payment of minimum prices on all producer milk received by fully regulated handlers regardless of where such milk is sold, and each of the approximately 75 outstanding orders contains such a requirement. After *United States v. Butler,* 297 U. S. 1 (1937), when the marketing order provisions of the Agricultural Adjustment Act were reenacted as the Agricultural Marketing Agreement Act the reenactment "expressly ratified, legalized and

part in connection with milk, to insure, in effect, that milk brought into a regional marketing area from a production area other than that regularly supplying such marketing area would not be subject to greater restrictions or limitations than applied to milk from the production area usually supplying the market, while at the same time allowing for similar treatment of milk from different production areas to prevent the dumping of cheap milk in any given market. See discussion of legislative history of section 8c(5)(G) in *Lehigh Valley Cooperative Farmers, Inc. v. United States, supra,* at pp. 91-97. Equal treatment is afforded all fully regulated handlers under the contested order and we have difficulty understanding the relevancy of section 8c(5)(G) in this controversy. The *order provisions* involved, unlike the contested regulation in *Lehigh,* did not prohibit or limit the marketing of petitioner's milk within the marketing area established under the order. *In re Yadkin Valley Dairy Cooperative, Inc.,* 22 A. D. 971 (1963).

Initially, at least one of the orders issued pursuant to the act did not price and pool milk sold outside of the regulated area. See *United States v. Rock Royal Cooperative, Inc., supra.* However, experience has demonstrated the futility of such approach to regulation.[12] Minimum pricing, "the immediate object of the act" (*Stark v. Wickard, supra,* at p. 291), cannot be maintained when part of the milk received from producers is not priced. (See illustrations in

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confirmed" (50 Stat. 246, 249) existing marketing agreements and orders of the Secretary of Agriculture *which then contained such pricing requirements.* Significaantly, the reenactment also included section 8c(5)(G) which is a *decisive indication* that the Congress did not intend this section to prohibit the pricing of outside area milk.

12. See, for example, respondent's Exhibit 1, which was not introduced for this purpose but which demonstrates the effect of unpriced milk on prices paid to dairy farmers under a State regulatory program.

respondent's brief, pp. 26-28 and 32-33.)[13] Testimony at the hearing by an expert in the field of milk marketing regulation also supported and explained this conclusion and indicated additional reasons for full regulation of a handler's operations. Consequently, as stated above, the Secretary, in his quasi-legislative capacity, has for more than 25 years followed the policy and practice of pricing all milk received by regulated handlers from producers wherever sold. The long standing and contemporaneous administrative construction of the act by the Secretary, the official charged with the duty of effectuating its purposes, is entitled to great weight. *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315 (1933); *United States v. American Trucking Associations, Inc.*, 310 U. S. 534, 549 (1940); *Federal Housing Administration v. The Darlington, Inc.*, 358 U. S. 84, 90 (1958).

It should be stated at this point, perhaps, that we do not believe that petitioner's position is unique when compared to that of handlers regulated under this order or under milk orders generally issued under the act. Milk orders issued thereunder universally regulate the handling of milk in defined regional marketing areas which do not necessarily or even usually coincide with the area of milk production for the market involved. See, *e.g.*, *United States v. Rock Royal Cooperative, Inc., supra.* The area of production or supply, that is, the milkshed, may and generally does encompass a much wider geographic area than that of the marketing area. For example, the order which was upheld in *Titusville* and *Rock Royal* regulated the handling of milk in New York City, and Nassau, Suffolk and Westchester Counties, all in the State of New York, while the milkshed

13. Petitioner does not clearly take the position that the Secretary lacks the power to price out-of-area sales. Rather, it now suggests in this quasi-judicial proceding that the Secretary might fix a different price for such sales.

supplying such market included at least parts of Pennsylvania, New Jersey, New York and Vermont. See *In re Mills Dairy Products Company et al., supra,* at footnote 4. Undoubtedly, handlers regulated under such order purchased milk in competition with unregulated handlers, as does petitioner, and also sold milk in competition with unregulated handlers. This record indicates that petitioner purchases milk in competition with handlers regulated under the New York-New Jersey order, the Philadelphia and Wilmington orders (presently the order regulating the handling of milk in the Delaware Valley marketing area) and unregulated handlers. Also, the record further demonstrates that petitioner sells milk in Delaware in competition with handlers regulated under the order in controversy herein, several other Federal milk orders and unregulated dealers. Such is probably the case with other handlers under Order No. 16, both with respect to milk procurement and milk sales.

It is virtually impossible to draw a line, that is, to define a marketing area, so that the sales of all regulated handlers are located therein and the sales of all unregulated handlers are outside thereof.[14] Even if such line of demarcation were possible, it would clearly not remain static due to the highly competitive nature of the regulated industry. Petitioner, in its presentation herein, oversimplifies or ignores this problem and overlooks many of the competitive forces at work in the unregulated portion of Delaware. It is clearly a distortion of the marketing scene to eliminate from consideration the handlers regulated under this order and under other Federal orders engaged in business in the State of Delaware as petitioner would have us do. Such

14. For a discussion of the problem of fringe or peripheral milk see *In re Suncrest Farms, Inc.,* 18 A.D. 191, 201-04 (1959), reversed on other grounds *Lehigh Valley Cooperative Farmers, Inc. v. United States,* 370 U. S. 76 (1962).

handlers purchase and sell milk there in competition with petitioner and the unregulated handlers. Petitioner also overlooks the fact that the order protects it to some extent from the competition of the unregulated Delaware handlers in the regulated marketing area. Petitioner superficially treats an "exquisitely complicated" matter (*Queensboro Farms Products, Inc. v. Wickard, supra,* at p. 974) and the delicate balancing of the many economic and marketing factors involved which is the function and purpose of rule-making is not appropriate or feasible in this, *the wrong forum.* See, *e.g., Acme Fast Freight, Inc. v. United States,* 154 F. Supp. 239 (S. D. N. Y. 1957). Petitioner, as all other handlers, could request amendment of the contested order to alleviate its alleged difficult situation. For example, petitioner could have requested the inclusion of the unregulated portion of the State of Delaware under Order No. 16 or under some other order so that its unregulated Delaware competition would come under regulation [15] or that the order be amended to provide for different pricing for milk sold outside the marketing area. This it has failed to do, although it now advances a suggestion for the latter approach in this quasi-judicial proceeding. The promulgation hearing or hearings upon which the order is based contain no such request or suggestions or evidence in support thereof.

Section 2(1) of the act (7 U. S. C. 602(1)) declares it to be the policy thereof to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as would establish parity prices, and sections 8c(18) of the act (7 U. S. C. 608c(18)) modifies this to

15. A request was made that such area be included within the Delaware Valley marketing area, but was denied for lack of evidentiary support by the proponents thereof that "unregulated competitors have any actual procurement advantage" or evidence with respect to the increase or decrease of sales by regulated handlers under that order in such area. 28 F. R. 11848, 11850.

provide for the prices therein described. Thus it is the statutory policy, in part, to establish and maintain an orderly market to bring about and maintain the statutory price level. *In re Independent Milk Producer-Distributors' Association*, 20 A. D. 1 (1961); *In re Hygeia Dairy Company*, 19 A. D. 257 (1960), *aff'd* (S. D. Tex. 1964); *In re Copiah Guernsey Dairy Cooperative, Inc.*, 16 A. D. 1193 (1957); *In re Beatrice Foods Co.*, 15 A. D. 767 (1956), *aff'd, Beatrice Foods Co. v. Benson* (N. D. Okla. 1957), 16 A. D. 177 (1957); *In re Terrace Park Dairy*, 12 A. D. 1383 (1953); see *Heinemann Creameries, Inc. and Kewaskum Dairy v. Benson* (E. D. Wis. 1953), 13 A. D. 1242 . See also *United Milk Producers of New Jersey v. Benson*, 225 F. 2d 527, 529 (D. C. Cir. 1955), *cert. denied*, 350 U. S. 1015 (1956). Such policy, of course, relates, in each case *to the regulated market involved*. It seems to us that only when the situation outside the regulated marketing area threatens the stability of the regulated market is it a direct concern for regulation. Cf. *In re Hygeia Dairy Company, supra; In re Mills Dairy Products Company et al., supra*. The alleged milk procurement and marketing picture presented by petitioner goes to the questions of the proper extent of the order, that is, the area for regulation, and the proper classification of petitioner thereunder. Once that has been determined, and petitioner does not and cannot contest the definement of the marketing area under the disputed order or its status as a pool plant handler and apparently has not requested and does not desire the extension of regulation into the unregulated area of Delaware, the issue of order validity based on matters occurring outside the marketing area is not the concern of the Secretary in his quasi-judicial, as distinguished from his quasi-legislative, capacity. In other words, absent the challenges to order validity mentioned above, and absent any claim of confiscation, petitioner has

not advanced any basis upon which it could be found that the disputed order is "not in accordance with law." [16]

"Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. *United States v. Rock Royal Co-op., supra,* 307 U. S. 533, 568-81, 59 S. Ct. 993, 83 L. Ed. 1446. Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete equality, for the variables are too numerous', he 'fulfills his role when he makes a reasoned' Order. *Mitchell v. Budd,* 350 U. S. 473, 480, 76 S. Ct. 527, 531-532, 100 L. Ed. 565 (1956)." *United States v. Howeth M. Mills et al., supra,* at p. 838.

## III

Turning now to the controversy *as posed* by petitioner, although we do not thereby concede or agree that its contentions with respect to section 8c(5)(G) are proper, it seems apparent to us that petitioner has an extremely difficult "row to hoe" in this proceeding by virtue of its position herein. Unlike the situation in *Lehigh* where the Court was concerned only with the milk entering the regulated marketing area upon which compensatory payments were imposed, petitioner's claim of invalidity, stated earlier in these Conclusions, calls for and requires a detailed economic analysis of the acquisition and marketing of milk by itself and others both inside and outside of the marketing area, including a full description of the competing forces present in such areas and the various elements of supply and de-

16. Petitioner's arguments directed to or based on the fact that it is a single plant operator were considered and answered, in effect, in *In re Willow Farms Dairy, Inc., supra,* at p. 823.

mand and milk costs and pricing in the production area where petitioner acquires its milk and in the areas of its disposition. This proceeding was remanded by the Court for such purpose (see, *United States v. Lewes Dairy, Inc. et al., supra*) basically at the instance of respondent herein. Such fact, however, does not alter the ground rules of a proceeding under section 8c(15)(A) of the act. It is petitioner's burden herein to establish the existence of the alleged unlawful "trade barrier." See, *e.g., United States v. Rock Royal Cooperative, Inc., supra; Bailey Farm Dairy v. Jones*, 61 F. Supp. 209, 217 (E. D. Mo. 1945), affirmed 157 F. 2d 87 (8th Cir. 1946), *cert. denied*, 329 U. S. 788 (1946); *Boonville Farms Cooperative, Inc. v. Freeman*, 23 A. D. 1330 (N. D. N. Y. 1964); *Sterling Davis Dairy v. Freeman*, 24 A. D. 1411, 1418 (D. N. J. 1965).

It is also patent, as concluded by the hearing examiner, that petitioner has failed to sustain its burden of proof herein, that is, petitioner has failed to establish an unlawful "trade barrier" by reason of the contested order and, in fact, has not even proved any competitive disadvantage by virtue thereof in connection with its operations in Delaware, as distinguished from its mere allegations of such disadvantage.

W. Weldon Brittingham, treasurer of petitioner, was its only witness at the hearing herein. After describing petitioner's operations generally, he testified that its regular supply of milk comes from 9 or 10 Sussex and Kent County, Delaware, producers, supplemented by purchases as needed from Warner's Dairy at Red Lion, Pennsylvania; and that there are between 500 and 600 milk producers in Sussex and Kent Counties, with approximately 100 producers selling to local dairies and the rest selling to handlers regulated by other Federal milk marketing orders. This witness named several local Delaware dairies with which Lewes competes

in buying milk from producers and in selling bottled milk, and testified that he knew what prices these dairies pay to their producers, although he could not state what those prices are. He testified that Lewes has to pay competitive prices to producers for milk; that it also has to be competitive in selling milk; and that the order forces it to pay more for milk than its competitors pay.

The witness, Mr. Brittingham, also stated that for some time after February 1, 1960, when the order became effective, petitioner paid its producers prices higher than the order blend prices, which payments were subject to the agreement described in Finding of Fact 4, but that since 1963 it has paid its producers only the order minimum or blend prices; that such prices are lower than the "going" prices paid by other dealers; that unless petitioner's prices to its producers are increased the producers will sell their milk elsewhere; and that petitioner has tried to take on additional producers but has been unsuccessful because of this price situation. The witness also testified that he did not know how much petitioner was paying for the milk it bought from Warner's Dairy, except that at times the price had been as high as $7 per hundredweight.

This is substantially all the evidence which could be construed as designed to show that petitioner operates at a competitive disadvantage in Delaware by reason of its compliance with Order No. 16. Petitioner offered no documentary evidence, nor did its witness testify as to the specific prices paid for milk at any time by any of the local dairies which the witness named as petitioner's competitors, nor did it call any producer witnesses.

Petitioner's case is based primarily on its alleged inability to meet competition from unregulated dealers in Delaware in the acquisition of milk and in the sale of bottled milk. But, petitioner offered no evidence as to the prices

paid or other costs incurred by its competitors, and there is accordingly no basis upon which we can compare costs or conclude that petitioner's costs are greater, as asserted by its witness. Unless this is so, petitioner does not suffer any competitive disadvantage and, of course, such disadvantage, *even if established,* need not be so severe as to constitute a "trade barrier." Moreover, although the witness claimed difficulty in purchasing producer milk because of petitioner's lower prices to producers since 1963, the record shows that petitioner's producer receipts during 1963 and 1964 *increased substantially* over such receipts for the previous 3 years.

In addition, petitioner's *total* milk acquisition costs are appropriate for consideration in connection with its attack upon the order. More than one-fourth of petitioner's total receipts of milk and milk products over a 5-year period came from Warner's Dairy and, with minor exceptions, was bought at prices substantially below Order No. 16 blend prices. (See Finding of Fact 5.) Also, all but a small portion of this milk was sold by petitioner as Class I milk. Petitioner protests that the $4 per hundredweight price it paid to Warner's Dairy does not represent petitioner's total cost because of the cost of hauling the milk so purchased from Red Lion, Pennsylvania, to its plant. But, although petitioner's witness testified as to the purchases from Warner's Dairy, no evidence was offered as to petitioner's hauling costs, or indeed as to the prices paid to this supplier by petitioner. The witness could not state what those prices were. They were later established by respondent's exhibits, which are based upon petitioner's report to the market administrator for the order.

We are somewhat at a loss to understand petitioner's allegations of competitive disadvantage in its operations in Delaware and a resultant "trade barrier" to sales in Mary-

land when all the evidence of record establishes that its business has increased substantially during the period it has been subject to regulation under the contested order. Exhibits introduced into evidence by respondent, which are based on petitioner's records, reveal that its Class I sales in the marketing area have remained the same, although decreasing as a percentage of its total Class I sales because such sales in Delaware, *the Area where it allegedly experiences the complained of competitive disadvantage in the sale of bottled milk, have grown significantly.* For example, petitioner's Class I sales outside the marketing area under Order No. 16 have increased from a total of approximately 2.9 million pounds in 1960 to a total of approximately 3.4, 3.8, 3.8, and 4.6 million pounds in 1961, 1962, 1963 and 1964, respectively. This is not the picture of a regulated handler who cannot compete in the sale of fluid milk in an unregulated area. Similarly, as stated above, petitioner's receipts of milk from producers has increased substantially from a total of approximately 3.35 million pounds in 1960 to a total of approximately 4.17, 4.49, 4.96 and 4.93 million pounds in 1961, 1962, 1963 and 1964, respectively. This is not the picture of a regulated handler who cannot compete in the procurement of milk with unregulated dealers.

Respondent also introduced into evidence at the hearing data with respect to Class I and uniform or blend prices under Order No. 16 and other pertinent Federal milk marketing orders. Such statistics demonstrate that the blend price under the Upper Chesapeake Bay order was generally during the years 1960 through 1964 fairly comparable with the blend price under the Philadelphia and Wilmington (Delaware Valley) orders for handlers also receiving milk

from producers in Kent and Sussex Counties, Delaware, with the Order No. 16 blend price being higher than such price for some of such handlers under such orders and lower than such price for other handlers under such orders.[17] Further, the New York-New Jersey blend price was uniformly lower than the Order No. 16 blend price. We find from these statistics no clear indication that petitioner experienced the claimed competitive disadvantage in the acquisition of milk. Moreover, to the extent that Philadelphia, Wilmington, New York-New Jersey and other Order No. 16 handlers also distributed bottled milk in the unregulated portion of Delaware, it is thought that petitioner would have, at the least, an advantage with respect to the cost of transporting such milk for sale in such area.

Upon analysis of the cost figures available, it appears that in reality petitioner's complaint is bottomed on the fact that it is a handler with a high Class I or fluid utilization. Order No. 16 contains a scheme whereby each handler pays for milk subject to regulation under the order at class values or prices, differing according to the use he makes of such milk, while producers receive a uniform or blend price based upon the total value of all milk used by all handlers under the order. Each handler pays his own producers at the uniform price and then, through adjustments with the producer-settlement fund kept by the market administrator, brings the total he has paid to producers up to (by paying into the producer-settlement fund) or down to (by receiving money from such fund) the total he is required to pay at class prices. In effect, a handler re-

17. It is believed that the apparently higher prices payable to Kent and Sussex producers for shipments of milk to Delaware Valley handlers would probably be substantially reduced by location differentials applicable under such order and hauling charges to such plants borne by producers.

ceives from the producer-settlement fund the amount by which the value of his milk at the class prices is less than the value at the blend price and pays into the producer-settlement fund the amount by which the value of his milk at the class prices exceeds the value at the blend price.

Because petitioner has a high fluid or Class I utilization which is above the market average, the blend or uniform price which it is required under the order to pay to its producers must be supplemented by payments into the producer-settlement fund equal to the amount by which the value of its milk at class prices exceeds the value thereof at the blend price. If the converse had been the case, that is, if petitioner's Class I utilization was below the market average, petitioner would have drawn money from the producer-settlement fund. At this stage in the history of milk marketing regulation, petitioner's complaint in this regard is totally lacking in merit. See, *e.g., United States v. Rock Royal Cooperative, Inc., supra; United States v. Howeth M. Mills et al., supra.*

Petitioner further complains that its unregulated Delaware competition need not make such payments or charge into the producer-settlement fund and that "such a charge created a trade barrier . . . when the charge is applied to the milk it sells outside the regulated area in competition with others who do not have to bear it." The record does not indicate what such competition pays initially for milk so we have no way of comparing the total costs for milk to petitioner and the unregulated Delaware dairies, including the cost of milk purchased from other handlers. Further, such dairies must pay the difference between the Order No. 16 Class I and blend prices on Class I milk which they distribute in the regulated marketing area. The requirement for such payment, of course, benefits or protects petitioner's sales in the marketing area and increases its competi-

tion's total cost for milk. Also, of utmost significance is the fact that even assuming that on balance petitioner pays more for its milk than its Delaware competitors the record clearly demonstrates that such alleged competitive disadvantage has not hampered it in its sales in the unregulated market and certainly is not an economic "trade barrier" to its entry into the regulated market. Petitioner's contentions to this effect are based on *abstractions lacking in evidentiary support.*[18]

It is recognized that a fully regulated handler could or might be at a disadvantage in competition with dealers paying a flat price not reflecting the use value of their milk. Such a situation, or disadvantage, *established at a promulgation hearing,* was, in part, the basis for inclusion of the Eastern Shore of Maryland within the marketing area. See *In re Mills Dairy Products Company, supra.* However, the petitioner has not established herein the existence of such economic disadvantage in its competition with unregulated Delaware dealers or with handlers regulated under other orders or that such alleged disadvantage was tantamount to a "trade barrier" proscribed by section 8c(5)(G) of the act.[19]

To summarize, we have found herein that petitioner has failed to establish the existence of an alleged "trade bar-

18. Nor could a claim of unjust discrimination on the basis of such payments prevail. Cf. *In re Terrace Park Dairy, et al., supra,* at pp. 1394-96. See also *In re Hygeia Dairy Company, supra; In re The H. E. Koontz Creamery, Inc.,* 20 A. D. 437 (1961).

19. In *Lehigh* the Court found an economic "trade barrier" on the basis of the fact that the partially or unregulated handler had to pay by virtue of the order and State regulation almost $3 per hundredweight more for the Class I milk he disposed of in the marketing area than the fully regulated handler was required to pay under the order for milk utilized in Class I. No comparable statistics were introduced in this proceeding. In fact, petitioner introduced no cost figures in this proceeding.

rier'' in contravention of section 8c(5)(G) of the act although we are of the opinion that this statutory provision is not applicable to the facts herein. It should be stated at this point also that we did not consider, in reaching our conclusions herein, Table H of respondent's Exhibit 2, other than to recognize that handlers in addition to petitioner, regulated under Order No. 16 and under other Federal marketing orders sold milk in the unregulated portion of Delaware. This fact is corroborated elsewhere in this record and we take no cognizance of the alleged volume of sales in such area set forth in the table or even the specific identity of the handlers listed thereon. Cf. *Wirtz v. Baldor Electric Company,* 337 F. 2d 518, 528-29 (D. C. Cir. 1963). In addition, the many contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with the decision are denied.

ORDER.

In view of the foregoing, the relief requested by petitioner is denied and the petition on remand is dismissed.

Copies hereof shall be served upon the parties.

Done at Washington, D. C.
June 20, 1966

THOMAS J. FLAVIN
*Judicial Officer*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 2353

LEWES DAIRY, INC. and CLIFFORD S. OTT and JAMES M. FAULKNER, as individuals, and d/b/a HOLLYBROOK DAIRY, a partnership,

*Plaintiffs,*

*v.*

ORVILLE L. FREEDMAN,

*Defendant.*

[260 F. Supp. 709]

## OPINION

Wilmington, Del.
Dated: November 9, 1966

LAYTON, District Judge

Plaintiff Lewes Dairy et al. ("Lewes") has brought this action to review the validity of a milk marketing order (Order No. 127, currently renumbered No. 16) promulgated by the defendant, the Secretary of Agriculture, pursuant to 7 U. S. C. § 608c et seq.

The plaintiff has properly exhausted its administrative remedies as provided by 7 U. S. C. § 608c(15)(A).[1] This

1. (15)(A) "Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law."

court has jurisdiction to review the validity of such order. 7 U. S. C. § 608c(15)(B).[2]

Plaintiff and defendant have filed cross motions for summary judgment. Basically, plaintiff complains that the Secretary's order, as applied to the plaintiff, creates an illegal trade barrier in violation of 7 U. S. C. 608c(5)(G),[3] (hereafter § (5)(G)), as construed by the Supreme Court in Lehigh Valley Co-operative Farmers, Inc. v. United States, 370 U. S. 76 (1962). Defendant, on the contrary, contends that the milk order is in accordance with law.

This controversy has been in existence for over five years and in the courts for over three years. Following earlier Department of Agriculture administrative hearings, cross motions for summary judgment were filed in this Court. At that time, on July 1, 1963, this Court held that the milk marketing order in question was invalid as applied to plaintiff, in that it violated § (5)(G), as construed in *Lehigh Valley*, supra.

On appeal, the Third Circuit reversed, United States v. Lewes Dairy, Inc., 337 F. 2d 827 (3rd Cir. 1964), ruling that the case should be remanded to the Department of Agriculture because the factual background of the trade barrier issue had not been sufficiently developed in the record to give the Department an opportunity properly to consider the question.[4]

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2. (15)(B) "The District Courts of the United States in any district in which such handler is an inhabitant, or has his principal place of business, are vested with jurisdiction in equity to review such ruling, . . ."

3. (5)(G) "No marketing agreement or order applicable to milk or its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or products thereof produced in any production area in the United States."

4. The *Lehigh Valley* case, which delineated the trade barrier concept, had been decided in the interval between the original Department hearings and the District Court proceedings.

Pursuant to the Court of Appeals decision, additional hearings were held before a Department of Agriculture examiner at which testimony was taken to develop the trade barrier question. On June 20, 1966, the Judicial Officer of the Department of Agriculture, acting for the Secretary of Agriculture, issued a "Decision and Order on Remand." That decision held that the milk marketing order in question did not create an economic trade barrier in violation of § (5)(G), and was, therefore, in accordance with law as applied to Lewes Dairy.

The court action was thereupon reinstituted by Lewes and the instant motions for summary judgment filed.

The power of this court in this review proceeding is limited to a determination as to whether the ruling of the Department of Agriculture Judicial Officer is in accordance with law. 7 U. S. C. 608c(15)(B), supra. This court cannot disturb the findings of the Judicial Officer if they are supported by substantial evidence. *New York State Guernsey Breeders' Co-Op v. Wickard,* 141 F. 2d 805, 808 (2d Cir. 1944), *Ogden Dairy Co. v. Wickard,* 157 F. 2d 445, 447 (7th Cir. 1946).

At this point in the litigation, the facts are beyond dispute. Originally, the action challenging the validity of Milk Order No. 16 was instituted by Lewes Dairy and Hollybrook Dairy. Hollybrook has since gone out of business, but it remains an interested party to these proceedings, and the decision vis-a-vis Lewes will be determinative of the *Hollybrook* case.

Lewes Dairy operates one milk processing plant located in Sussex County, Delaware. There it processes milk and resells it in fluid, drinking form to retail stores. Lewes is considered a "handler" of milk products in the terminology of the Act. The dairy farmers from whom it purchases raw milk are termed "producers." The regular

source of supply of the milk Lewes processes and sells is from producers in Kent and Sussex Counties, Delaware. Lewes regularly purchases additional milk to supplement its requirements from a "balancing station", which is another handler located in Pennsylvania.

Lewes distributes the greater part of its production in Kent and Sussex Counties. *These two counties are not regulated under any Federal Milk Marketing Order.* Lewes ships a part of its production into the eastern shore counties of Maryland. *These counties are within the Upper Chesapeake Bay Milk Marketing area*, the area regulated by Milk Order No. 16.

The actual quantity of milk shipped by Lewes into these Maryland counties is not in dispute. However, what portion of its production this represents is viewed differently by the parties. The Judicial Officer of the Department of Agriculture found as a fact that Lewes ships into Maryland annually between 40 and 61 percent of its receipts of milk from producers. Department of Agriculture, Decision and Order on Remand, Findings of Fact, No. 2, page 2. While this is an accurate statement as far as it goes, it is misleading. The Department chooses to estimate Lewes' delivery into Maryland as a *percentage of only the milk Lewes buys from its producers, the Delaware dairy farmers,* disregarding completely the milk it processes which it purchases from its Pennsylvania balancing station. Taken as a percentage of its entire production, certainly a more meaningful figure, Lewes ships on an annual basis between 35 and 45 percent of its production into Maryland and sells from 55 to 65 percent in Delaware. However, for purposes of this decision, it does not matter very much which percentage figures are used to describe the amount of milk Lewes ships into the milk marketing area.

Since Lewes ships in excess of 10% of its production into Maryland, it is fully regulated under the terms of

Milk Order No. 16. The validity of this Order, which covers counties in Maryland on both shores of the Chesapeake Bay, was sustained, in general, in United States v. Mills, 315 F. 2d 828 (4th Cir. 1963), *cert. den. sub nom.* Willow Farms Dairy, Inc. v. Freeman, 374 U. S. 832 (1963).

The operation of Order No. 16 is fully described in that opinion. In brief, it provides that the sales of fluid milk by a handler within the marketing area (as opposed to the handler's home area of operations) shall determine whether a milk company is to be regulated. The order is written on a plant basis. That is, if a handler has more than one plant, and ships milk from only one plant into the marketing area, it is regulated on that plant alone. Any plant that has 10% or more of its milk shipped into the marketing area is fully regulated (regulated on 100% of its production) under the terms of the order and is termed a "pool plant". If a plant sells less than 10% of its production into the marketing area, it is regulated only on that milk it in fact ships into the area.

Since Lewes sells more than 10% of its production in Maryland and thus is a fully regulated pool plant, it is forced to pay the regulatory charges the order provides on *all the milk it purchases, and not just on that portion of the milk it buys that is later sold in the Maryland marketing area.*

Under Order No. 16, milk is classified according to the use made of it by the handler, and each class is assigned a price for regulatory purposes. Milk processed for consumption in fluid form is characterized as Class I. Milk used to make manufactured products such as butter and cheese is designated as Class II. Class I milk is assigned a higher price than Class II milk. Lewes is predominately a Class I handler.

The Order regulates the sale of milk within its territorial area in several related ways. First, it directs

that a "compensatory payment" be made into the market's "Producer-Settlement Fund", administered by the Order's "Market Administrator", upon all milk purchased by one handler from another (such as the milk Lewes purchases from its Pennsylvania "balancing sation"). The order also fixes a price known as the "blend price", which is the minimum that must be paid to the producers (farmers) for raw milk. The blend price is, in general, a weighted average of the Class I and Class II prices. Finally, the Order requires a predominantly Class I handler, such as Lewes, to make a payment, determined by the difference in prices between the blend price paid and the assigned Class I price, into the producer settlement fund. This payment must be made regardless of what competitive conditions have required the handler to pay. Actually, since the inception of this Milk Order, the competitive price for milk in Kent and Sussex Counties, Delaware, has been higher than the Maryland blend price.

The plaintiff objects to the application of Milk Order No. 16 to it insofar as it requires regulatory payments into the Maryland fund on milk sold by it outside the marketing area i.e., milk purchased for sale in Kent and Sussex Counties, Delaware. Plaintiff argues that the Order thus applied to it on its Delaware sales and not so applied to any of its Delaware competitors, creates the "trade barrier" in violation of §(5)(G), as construed in *Lehigh Valley, supra.*

In the *Lehigh Valley* case, the imposition of certain "compensatory payments" (somewhat different in nature from the compensatory payments required under this Order) was challenged as violative of §(5)(G). The Supreme Court, in upholding the challenge, read into §(5)(G) the trade barrier concept. After carefully reviewing the legislative history of the Agriculture Marketing Act of 1937, and especially §(5)(G), the Court said:

> ". . . §8c(5)(G) was compendiously intended to prevent the Secretary from setting up, under the guise of price-fixing regulation, *any kind of economic trade barriers,* whether relating to milk or its products." 370 U. S. 76, 97. (Emphasis added.)

The Court observed, referring to 79 Cong. Rec. 9462, that §(5)(G) was intended to restrain the Secretary of Agriculture from using his powers to impede the free flow of commerce of dairy products or from requiring anything more of milk from out of the market area than that it "comply with the same conditions which the farmers and distributors comply with in that region." *Ibid.* at 92.

Thus, the Court indicated that in devising milk market regulations, the Secretary was empowered to regulate out-of-market milk only to put it into equality with milk produced in the market. The Secretary could not, through his regulations and orders, cause out-of-market milk to bear a higher burden, because this would tend to discourage the introduction of outside milk into the market and thus create a trade barrier.

It is evident that the term "trade barrier" in the context of milk marketing regulations was not narrowly defined in *Lehigh Valley.* It stands for a rather broad concept without a specific set of requirements which must always be met. The important consideration is how the regulation in question operates with respect to the particular handler. If it has the effect of creating a trade barrier as to a particular handler, it is invalid as to that handler. Justice Harlan made this point clear in *Lehigh Valley:*

> ". . . With respect to *these petitioners,* however, and with regard to *the regulation here in issue,* we conclude that the action of the Secretary of Agriculture exceeded the powers entrusted to him by Congress." 370 U. S. 76, 99. (Emphasis added.)

The Secretary, in his brief and on oral argument before the Court, urged that, notwithstanding *Lehigh Valley* and §(5)(G), the expressed intent of Congress was to apply full regulation to handlers in Lewes' position. The statutory provisions authorizing marketing orders were originally enacted as part of the 1935 amendments to the Agricultural Adjustment Act of 1933. Act of August 24, 1935, c. 641 §5; 49 Stat. 753. That act also contained certain provisions imposing processing taxes which were invalidated by the Supreme Court in *United States v. Butler*, 297 U. S. 1 (1936).

After the *Butler* decision, Congress became disturbed lest it be interpreted as invalidating the marketing agreement provisions as well.[5] To make it clear that it had intended that the marketing order sections be separate from the processing tax provisions, Congress expressly affirmed and validated the former by reenacting them, with certain amendments not relevant here, as part of the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. §601 et seq. The 1937 statute contained a provision expressly approving all marketing orders then outstanding. Act of June 3, 1937, c. 296, Sec. 4; Stat. 249.

From this, the Secretary argues that at the time of this express Congressional ratification, every milk marketing order without exception then in effect set minimum prices to be paid by regulated milk companies on milk not shipped into the marketing area. However, insofar as can be ascertained, each and every one of these early milk orders *contained provisions for adjusting the regulatory price on milk sold outside of the marketing area* to the prevailing price in the area where the milk was actually sold.[6] Thus,

5. Sen. Rep. No. 565, 75th Cong., 1st Sess., p. 2; H. R. Rep. No. 468, 75th Cong., 1st Sess., p. 2.

6. These old milk marketing orders, which were not made part of the record, are not easily available for inspection. However, plaintiff's attorney was permitted to examine the orders and stated to the

rather than support the Secretary's case in this regard, it appears, on the contrary, that Congress *approved milk orders which recognized and accommodated the very kind of problem confronting Lewes here.*

The defendant also argues that despite the broad language in *Lehigh Valley,* the instant case is controlled, not by it, but by *Titusville Dairy Products Co. v. Brannan,* 176 F. 2d 332 (3rd Cir. 1949), *cert den.* 338 U. S. 905 (1949). That case, it is argued, "squarely decided" the issue before the court here in favor of the Department of Agriculture, in approving full regulation of a handler which shipped only a portion of its milk production into the New York City marketing area.

The defendant's reliance on that case is, it is believed, misplaced. The court's approval of the full regulation in similar circumstances was implicit at best. The basic question before the court was one of definition—whether Titusville was a "handler" within the meaning of Order No. 27. The Third Circuit decided that, since Titusville continued to hold a franchise, or certificate of approval, from the New York Department of Health to sell milk in the metropolitan New York area, and since the milk order provided regulation only on the basis of such approval, Titusville was fully regulated even though it had ceased to ship any milk into the marketing area. The Circuit Court did not hold that full regulation of a handler introducing only a portion of its production to the marketing area was not violative of § (5)(G). It does not appear that § (5)(G) was even considered by the court. In any event, it may be

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Court that they expressly relieved handlers in Lewes' situation from full regulation on milk sold in their own market. The Secretary's attorney was permitted to produce copies of these orders to refute the plaintiff's statement, but the time granted for this purpose has long since expired. The Court assumes the correctness of plaintiff's statements.

argued with some force that the clear expression of policy by the Supreme Court thirteen years after the *Titusville* decision, had the effect of overruling, *sub silentio, Titusville,* to the extent, at least, that the case appeared to approve full regulation of a milk handler introducing only a portion of its production into the marketing area.

This Court is not unmindful of the language in *Lehigh Valley* which indicates that the Supreme Court left open the question of the validity of full regulation of a handler introducing only a portion of its production into the marketing area.[7] This necessitates an examination of the record to see whether the facts of this case demonstrate the existence of the kind of barrier contemplated by the *Lehigh Valley case.*

With this in mind, the record of the remanded proceedings before the Secretary's Hearing Examiner has been carefully scrutinized to determine whether there is substantial evidence supporting the Secretary's finding that Order No. 16 does not create a trade barrier. The question here for decision is whether, as to *this plaintiff, this regulation* creates a "trade barrier." The record of the remanded proceedings indicates that rather than there being substantial evidence revealing the absence of a trade barrier, as the Secretary found, nearly all the evidence points to the existence of an illegal trade barrier. The record clearly shows that Lewes is put at a severe competitive disadvantage by the operation of the Secretary's order.

Unchallenged in the record is the fact that Lewes' primary competition is with about 10 other small dairies lo-

7. "Whether full regulation of the petitioners would be permissible under the Act is a question which we need not reach in this case. If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, the validity of such a provision would involve considerations different from those now before us. . . ." 370 U. S. 76, 99.

cated in Kent and Sussex Counties, Delaware.[8] It is undisputed that most of the milk which Lewes purchases is from dairy farmers in those counties and that a majority of the milk Lewes sells is to retail stores in the same locality. Lewes competes with the other local handlers both in purchasing the milk from the Delaware farmers and in selling it to the retail stores.

The record indicates that Lewes must pay a price for its milk, set by the forces of supply and demand, which is greater than the "blend price" fixed by the Maryland order (and paid by Maryland handlers to Maryland farmers). In addition to the competitive price Lewes must pay in Delaware, it is required by the terms of the order to pay into the producer-settlement fund a regulatory charge determined by the difference between the Maryland Class I price and the "blend price", *not just on the milk Lewes introduces into the Maryland market area, but also on the milk, representing the major part of its business, which it sells in Delaware.*

None of the dairies with which Lewes is in competition sells more than 10% of its production in the Maryland market. Thus, the competitors of Lewes are regulated only on that proportion of production actually sold in the

8. It is true that some of Lewes' competition comes from handlers other than these 10 small Delaware dairies, which other handlers are regulated under milk orders other than Order No. 16 (i.e. milk orders regulating the Philadelphia and Wilmington areas). At the remanded proceedings, the Secretary attempted to introduce into evidence a table purporting to prove that Lewes' primary competition is with the regulated, rather than the local, unregulated, handlers. However, the Department's attorneys refused to permit plaintiffs to examine the underlying data from which the exhibit was prepared, and objected to its admission for this reason. In the Decision and Order on Remand, at page 18, the Department's Judicial Officer ruled that the contents of that exhibit could not be considered. Thus, it is uncontested on the record that plaintiff's primary competition is with the small, unregulated (or partially regulated) handlers located in Kent and Sussex Counties, Delaware.

marketing area, if any, while Lewes is regulated on all of its production.

Lewes, faced with the situation, has attempted to live with it by paying its farmers in Delaware only the lower Maryland "blend" price. However, according to the record which is uncontradicted, its producers soon gave Lewes an ultimatum: pay the higher local competitive price or they would sell their milk to the other dairies. This threat is a real one. Severe drought conditions over the past few years have created a milk shortage in Kent and Sussex Counties, Delaware. The farmers would be able to sell their milk, at the Delaware market price, to other dairies who are Lewes' competitors in Delaware. The farmers eventually agreed to help Lewes by accepting the lower price pending the outcome of these court proceedings. It is uncontradicted that in the long run, should Lewes fail to pay the local competitive price, it will lose its sources of production.

The net effect of the Secretary's milk order, if it is allowed to remain in force as currently written, would be either to put Lewes out of business for failure to secure raw milk, or to force it to pay more for its milk than its competitors, which might well have the same end result. By having to pay the local competitive price for milk, and alone having to pay an extra amount into the Maryland producer fund,[9] Lewes is put at serious competitive disadvantage. This is a penalty Lewes is forced to pay for the single reason that it chooses to sell some of its production in Maryland. Surely, this is the kind of "economic trade barrier" sought to be prohibited by § (5)(G), as construed in *Lehigh Valley*.

9. The extra amounts in question, which have been paid into court each month pending the outcome of this litigation, total over $240,000.00 as of October 19, 1966.

The crux of the Secretary's decision below finding that Order No. 16 did not create a trade barrier as to plaintiff (and the "substantial evidence" relied on) is that in the years since the Order has been in effect, the plaintiff's volume of milk distributed has increased substantially. Department of Agriculture, Decision and Order on Remand, Findings of Fact, Nos. 7 and 8, pp. 3 and 4. This is hardly a justification for imposing on Lewes a penalty which its competitors do not bear. Simply because Lewes has been able to live with full regulation for a few years does not warrant continued imposition of an illegal and unjustified penalty. In the first place, it should be noted that an increased volume of production does not necessarily relate to increased, or even continued, levels of profits. Second, Lewes has only been able to purchase its raw milk at the lower "blend" price due to the cooperation and understanding of the Delaware farmers supplying it. As noted previously, once this litigation is finally concluded, Lewes will lose its sources of supply unless it pays the higher Delaware market price.

It is clear that Lewes can avoid full regulation of its milk production by electing to discontinue its sales in Maryland, at least to the extent of reducing them to an amount representing less than 10% of its total production. But this is perhaps the clearest indication of the barrier effect of Milk Order No. 16. As applied to Lewes Dairy, the order either tends to force it to discontinue a large part of its business in Maryland, or continue it under a severe competitive disadvantage.

Such a situation as unfair as this might be justifiable if full regulation of a plant like Lewes were necessary to achieve some higher goal, such as to prevent the disintegration of effective milk marketing regulation. The government puts forth this argument. However, the record indicates that, rather than necessary to achieve any im-

portant goal, *the Secretary could just as effectively regulate milk marketing in the area covered by Order No. 16 with partial, rather than full, regulation of Lewes Dairy.*

The testimony of Herbert L. Forest, the Secretary's expert witness at the remanded proceedings, shows this with clarity. Forest is one of the leading experts on Federal milk marketing in the United States. He has been involved with milk marketing since 1934, except for a brief period during World War II. Since 1953, he has been Director of the Dairy Division, Consumer and Marketing Service of the United States Department of Agriculture. He has testified in court as an expert on Federal milk marketing orders.

Mr. Forest stated preliminarily that there were three reasons for requiring full regulation of Lewes Dairy under Order No. 16, even though it might create an economic disadvantage for it. On cross-examination, however, Mr. Forest admitted that these reasons, while having validity in general, *did not apply in the case of Lewes Dairy and Order No. 16.*

Mr. Forest testified than one reason for full regulation of a handler such as Lewes is that if such handler was not fully regulated, it might have a profit advantage or shelter in its business outside the regulated marketing area that would enable it to compete more effectively within the marketing area. That is, partial regulation would allow a handler to use outside profits to subsidize it within the marketing area. However, Milk Order No. 16 is written on a plant basis rather than on a company basis which permits a profit shelter. Hence, a multiple-plant handler could arrange its production to devote the production of only one of its plants for sales into the regulated market. Under the terms of the order, such a handler would be regulated only on the basis of that one plant. Mr. Forest stated that such a multiple-plant handler could have a profit shel-

ter under the order as written. This underscores the unfairness of Milk Order No. 16 as applied to Lewes. Since Lewes has only one plant, it is regulated on 100% of its production. If it had two buildings, one next door to the other, it could achieve the partial regulation which the Secretary denies to it. It would be unfair to justify full regulation of Lewes for the profit shelter reason, when a handler with more than one plant can operate under such a shelter.

Mr. Forest stated that another reason for requiring full regulation of Lewes is that if such handler were not fully regulated, there would be no effective administrative technique for assuring that the handler paid to its producers the minimum blend price on the milk actually introduced into the marketing area. However, Mr. Forest admitted that either of two alternative administrative techniques suggested by plaintiff's counsel would work just as well to assure payment of the minimum blend price. First, since under the Order as presently written there is no such administrative problem in the case of a multi-plant handler (it must pay the regulatory blend price on its purchases delivered to its fully regulated plant), a similar technique could be used with a single plant handler. That is, Forest said that the handler could simply designate which of its farmers were to be regarded as supplying the milk the handler ships into the marketing area and be required to pay only to those farmers the regulatory minimum price.

Also, Mr. Forest agreed that an alternative system could be devised which would require the handler to pay to each of its farmers the regulatory price on that percentage of the milk purchased that the handler in turn actually introduced into the marketing area, and permit the handler to pay the local competitive price on the balance of its purchases from each farmer.

Thus, full regulation of Lewes for administrative control reasons is not required. The Secretary's expert wit-

ness admitted that at least two other administrative techniques were available to assure proper payment of the minimum blend price on that portion of a partially regulated handler's purchases introduced into the marketing area. Either of these alternative techniques used in connection with partial regulation of Lewes, would obviate the need for the unfairness caused by full regulation.

Mr. Forest stated that a third reason for applying full regulation to a handler such as Lewes is that it is necessary to bring regulatory benefits to farmers who supply milk sold in the regulated marketing area only during periods of peak demand. However, Mr. Forest agreed that this reason is not one that pertains to the Lewes case, a Class I handler, since the reason is based upon the desirability of bringing regulatory benefits to farmers whose milk is devoted to Class II uses in times other than the period of peak demand.

Thus, although the Secretary continues to argue that full regulation of Lewes Dairy is necessary to carry out the overall objections of the Agriculture Marketing Act, a closer analysis demonstrates that there is not a single valid policy reason for full regulation of Lewes under Milk Order No. 16.

Viewing the record as a whole, the Court concludes that, insofar as it concerns Lewes, Milk Order No. 16 is arbitrary, unfair and, most importantly, wholly unnecessary. It constitutes a trade barrier within the purview of the *Lehigh Valley* decision and is consequently unlawful.

Pursuant to Section (15)(b)(1),[10] these proceedings are remanded to the Secretary of Agriculture. The Court

10. ". . . If the court determines that such a ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. . . ."

directs that Milk Order No. 16 be amended so as to cause the plaintiffs herein to be regulated under the terms of said order only as to that portion of its production actually introduced into the Upper Chesapeake Bay marketing area.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 16528

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LEWES DAIRY, INC., AND CLIFFORD S. OTT, ET AL., d/b/a HOLLYBROOK DAIRY

*v.*

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE,
*Appellant.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

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Argued November 7, 1967

Before STALEY, *Chief Judge,* KALODNER and FORMAN, *Circuit Judges.*

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## OPINION OF THE COURT

(Filed September 25, 1968)

By FORMAN, *Circuit Judge.*

This is the second time the Secretary of Agriculture appeals from an order of the United States District Court for the District of Delaware which held invalid certain minimum pricing provisions of Milk Marketing Order No.

16[1] on the ground that, as applied to Lewes Dairy, Inc.,[2] they created a prohibited "trade barrier". The Order in question, promulgated by the Secretary pursuant to authority granted him by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U. S. C. § 608c, regulates the milk industry in the Upper Chesapeake Bay, Maryland marketing area.

In an earlier proceeding, following Department of Agriculture administrative hearings,[3] the District Court held that the Milk Marketing Order in question was invalid as applied to Lewes in that it violated 7 U. S. C. § 608c(5)(G), as construed in *Lehigh Valley Cooperative Farmers, Inc. v. United States.*[4]

On appeal this court reversed the ruling of the District Court and held that the case should be remanded to the

1. Originally, this Order, which became fully effective February 1, 1960, was denominated No. 127; it has since been renumbered as No. 16. See 7 C. F. R. Part 1016. Hereinafter, Order No. 16 will be referred to without number.

2. Technically this appeal involves appellees, Lewes Dairy, Inc., and Clifford S. Ott and James M. Faulkner, doing business as Hollybrook Dairy, a partnership. During the course of this litigation, Hollybrook Dairy was sold and is no longer doing business. Its interest in the proceeding, which relates to certain back payments, has been represented by Lewes Dairy. For convenience the appellees will be referred to hereinafter as Lewes.

3. Shortly after the Order became effective, its validity was challenged by Lewes and several Maryland milk companies in administrative proceedings. From the ruling therein that the Secretary had lawfull exercised his authority, judicial relief was sought by both the Maryland companies and Lewes in the respective United States District Courts of Maryland and Delaware. *In re Mills Dairy Products Co.*, 20 A. D. 541 (1961). In the Maryland cases, the Court of Appeals for the Fourth Circuit upheld the Order on issues unrelated to those advanced herein by Lewes, reversing the contrary ruling of the District Court of Maryland. *United States v. Mills*, 315 F. 2d 828 (4 Cir. 1963), *reversing* 206 F. Supp. 239 (D. Md. 1962), *cert. denied, sub nom., Willow Farms Dairy, Inc. v. Freeman*, 374 U. S. 832 (1963).

4. 370 U. S. 76 (1962).

Department of Agriculture to give it an opportunity properly to exercise its statutory powers, because the trade barrier issue had not been raised or considered in the administrative proceedings which were held approximately one year prior to the decision in *Lehigh Valley.*[5]

The Judicial Officer, acting for the Secretary, held further hearings on the remand and, in a formal decision, rejected the challenge to the Marketing Order as both unsupported by the record and incorrect in law.[6] Judicial review of this ruling was sought by Lewes, and again the District Court held the Order invalid as creating a trade barrier.[7] On this appeal the Secretary, for the second time, contends that the District Court erred in concluding that the Marketing Order, as applied to Lewes, created a trade barrier.

The operation of the Milk Marketing Order and the facts of this case will be briefly summarized since they are at this point "beyond dispute". Under the Order, milk is classified according to the use made of it by milk companies, or "handlers". Thus, milk used in fluid form is Class I, and milk used to manufacture products such as butter and cheese is Class II. The Order establishes a minimum price for each class of milk—the Class I fluid price being higher than the Class II price.

These established prices reflect those which would usually be paid for milk depending on use value. Because of the price differential in an unregulated market, where the supply of fluid milk is greater than the demands of the fluid milk market, chaotic conditions often resulted among

5. *United States v. Lewes Dairy, Inc.*, 337 F. 2d 827 (3 Cir. 1964), *cert. denied*, 379 U. S. 1000 (1965).

6. *In re Lewes Dairy, Inc.*, 25 A. D. 709 (1966).

7. *Lewes Dairy, Inc. v. Freeman*, 260 F. Supp. 921 (D. Del. 1966).

producers each seeking to benefit from the greater use value, and therefore the higher price paid for milk used in fluid form. One of the major purposes of the Agricultural Marketing Agreement Act was to create and maintain an orderly market and, in so doing, assure the dairy farmer an adequate minimum price for the milk he delivered to the handlers regardless of how the milk was later used. To avoid the often destructive competition of the unregulated market, a method was devised whereby handlers are required to pay at least a uniform "blend" price to the producers regardless of the use to which it has been put. To arrive at this blend price, all handlers who receive or distribute milk within the marketing area are required to submit monthly reports to the Market Administrator, listing the quantity of milk they have handled and the use for which it was sold. These reports are tabulated and each month a blend price is established which represents the average of the class prices weighted by the amount of producer milk actually used in each class by all of the handlers regulated under the Order.

In promulgating a marketing order the Secretary must consider the supply of milk upon which the market, it this instance, Upper Chesapeake Bay, Maryland, regularly and normally depends. This milk, comprising the "market-wide pool" the Secretary found consisted of that received by plants regularly serving the market area with fluid milk. The regulatory scheme was designed to affect those plants of handlers which have substantial business in the market area. These plants, called "pool plants", are those which utilize at least 50 percent of the milk received from farmer producers as fluid milk and distribute at least 10 percent of those receipts in the form of fluid milk in the marketing area. The Marketing Order places pool plants

under "full regulation". This means that the milk company or handler which operates a pool plant must pay producers at least the uniform blend price on all milk received from them irrespective of the uses made of the milk by the handler or the places where it is later distributed.

While requiring that the blend price be paid to producers, the Act also recognizes that regulated handlers may make different uses of the fluid milk which they purchase. To make adjustments among the handlers and thereby reflect the class use value of the milk to the handler, a producer settlement fund is established by the Order. Each regulated handler pays into, or draws from this fund the difference between the amount paid to its producers under the uniform blend price and the use value of its milk computed at the established class prices. A handler who distributes most of his milk as Class I fluid milk has a greater use value for the milk than the blend price which he paid for it. He would contribute the difference between the blend price and the class utilization price into the fund. A handler who paid the blend price but used the milk to manufacture products would draw from the fund the difference between the blend price he paid and the lower class utilization price. In this way, each handler utimately pays a price for the milk he purchases which reflects the use he makes of it. The net result of this regulation, is that handlers pay for the milk according to its use value to them while the producer farmers are protected from the perilous competition for the fluid milk market by the automatic allocation to them of the blend price which apportions the profitable fluid milk market and the burdensome surplus market among all the producers that serve the marketing area.

Lewes operates one milk processing plant, located in Sussex County, Delaware, from which it distributes fluid

milk to retail outlets in the area of Maryland regulated by the Marketing Order in question, and various parts of Delaware which are unregulated by any Marketing Order. The regular source of supply of the milk which Lewes processes and sells is from nine or ten producers, all from Kent and Sussex Counties, Delaware. An additional supply of milk, ranging from 18 to 33 percent of its total annual receipts, is obtained from another handler located in Pennsylvania when it is needed by Lewes to balance or supplement its requirements.

The Secretary found that Lewes utilized substantially all of its milk in Class I form and that annually it distributed in the regulated area between 40 and 61 percent of its recipts from farmer producers. Lewes admits that this finding is accurate but argues that when its receipts from all sources are considered it ships on an annual basis, between 35 and 45 percent of its total production into the regulated marketing area and sells the remaining 55 to 65 percent in Delaware. Regardless of which figure is used, the Order imposes full regulation on Lewes since it distributes more than 10 percent of its production in the regulated area.

Prior to the effective date of the Order, Lewes paid its producers at the competitive Delaware price which was higher than the uniform blend prices subsequently established under the Order.[8] Because the Order imposes full

8. For some time after February 1, 1960 when the Order became effective, Lewes continued to pay its producers the higher Delaware market price subject to an agreement by the producers to refund to Lewes all amounts in excess of the blend prices if Lewes should be unsuccessful in this litigation. Since February 1963, however, Lewes has paid its producers only the minimum blend price required by the Order. Pursuant to an order of the District Court, all payments due from appellees to the producer-settlement fund have been paid each month into the court's registry pending the outcome of this litigation. As of June 1, 1967, Lewes Dairy has deposited $261,503.66; Hollybrook Dairy has paid $18,236.64 and is charged with owing an additional $45,574.85.

regulation on it, Lewes contends that its principal competitors, who are unregulated Delaware dairies, enjoy a price advantage. Full regulation requires Lewes, a fluid milk handler, to pay into the producer-settlement fund the blend price—Class I differential on all the milk it processes even though the greater portion of it is distributed in the Delaware market. Thus, it contends, the total cost of the milk it purchases (the price it pays to its producers plus the amount it pays into the fund) is greater than the cost which its unregulated Delaware competitors must pay. Also, Lewes contends that the Delaware producers to whom it pays the blend price will not sell to it at that rate after this litigation, if Lewes is unsuccessful, because they can get a higher price for their milk from the unregulated Delaware handlers.

Lewes concedes that as to the milk it distributes in the regulated marketing area it should meet the obligations imposed on it by the Marketing Order and pay the blend price —Class I differential into the producer-settlement fund. But Lewes insists that full regulation, which exacts from it this differential on all milk, including that which never enters the regulated marketing area, in effect, creates an economic trade barrier on its shipments of milk into Maryland in violation of section 8c(5)(G) of the Agricultural Marketing Agreement Act[9] as construed by the Supreme Court in *Lehigh Valley*.

The District Court accepted the argument of Lewes that *Lehigh Valley* controls the decision in this case. It construed that decision as meaning that full regulation of Lewes constituted an economic trade barrier in violation of section 8c(5)(G) of the Act.

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9. 7 U. S. C. § 608c(5)(G):

"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

*Lehigh Valley* involved the legality of a "compensatory payment" provision of the New York-New Jersey Milk Marketing Order. Such compensatory payments were assessed against "outside" milk companies, which, because of their limited sales in the marketing area, were not fully regulated and were therefore free to purchase their milk at less than the minimum class prices or blend price. Because the outside handlers could disrupt the regulatory scheme of the Marketing Order by introducing underpriced milk into the market, the Order required them to pay into the producer-settlement fund on all the fluid milk they sold in the market area the difference between the highest fluid and lowest surplus class prices established by the Order. The essence of the plan, as the Supreme Court noted, was the imposition of "special monetary exactions on handlers introducing 'outside' milk for fluid consumption into a marketing area in months when there is a substantial surplus of milk on the market."[10]

The Court held the plan to be an invalid attempt to effect competitive parity among non-pool and pool handlers and to correct the disruptive impact on the total regulatory scheme caused by the importation of unregulated outside fluid milk. Since the compensatory payment bore no relation to the actual cost of the milk, the effect of the plan, under the particular facts of that case, was to make outside or non-pool milk more expensive and thereby protect local producers and pool handlers in the marketing area from competition with outside fluid milk. The compensatory payment plan in *Lehigh Valley* constituted an economic trade barrier in violation of section 8c(5)(G) because it prevented outside handlers from competing in the marketing area on equal terms with others doing business therein. The legislative history of section 8c(5)(G) was fully examined by the

10. 370 U. S. at 82.

Court, and it concluded that the intent of that section was to assure that milk and milk products brought into a marketing area from outside the area would not be subject to greater restrictions or limitations than would be applied to milk and milk products within the area.

In the instant case, Lewes is not an outside dealer. It is a fully regulated handler associated with the marketing area by virtue of its substantial distribution in the area. The regulations to which it is subject are identical with those imposed upon every other regulated handler doing substantial business in the area. Lewes does not contend that it cannot compete on equal terms within the market area. Its contention that the Order erects a trade barrier is based on the argument that, because of the payments it is required to make into the producer-settlement fund on the milk which it distributes in Delaware outside the regulated market area, Lewes finds itself at a disadvantage with respect to the unregulated handlers with whom it competes in Delaware. The effect, it submits, is to discourage it from doing business in the regulated Maryland area.

In *Lehigh Valley* the Court did not consider the difficulties encountered by a regulated handler doing business in an unregulated area. In fact the Court expressly declined to consider whether section 8c(5)(G) prohibits full regulation. It stated:

> "Whether full regulation of the petitioners would be permissible under the Act is a question which we need not reach in this case. If the Secretary chooses to impose such regulation as a consequence of a handler's introducing any milk into a marketing area, the validity of such a provision would involve considerations different from those now before us."[11]

11. 370 U. S. at 99.

The Supreme Court, in *Lehigh Valley* overturned a system of "compensatory payments" because, as it said therein, "with respect to these petitioners" the payments demanded effected a trade barrier to the introduction into the market area of "outside" milk. The Court did not strike down all compensatory payments, rather it found that the particular rate of payment involved therein was invalid.[12]

In *Sterling Davis Dairy v. Freeman*,[13] the plaintiffs therein relied on the rule of *Lehigh Valley* in their effort to show the discriminatory and illegal effect of the regulation which they challenged. The court, however, rejected their application of *Lehigh Valley* because they had not demonstrated the discriminatory effect of the challenged regulation as had been done in *Lehigh Valley*. It stated:

> "It is to be noted that the crux of the *Lehigh* ruling rests in the actual discriminatory nature of the *rates* demanded of non-pool handlers introducing 'outside' area milk." [14]

The petitioners in *Lehigh Valley* introduced specific rates and prices to support their contention that the Order, as applied to them, was discriminatory. As an example, they showed that the regulation required one of the petitioning handlers to pay $9.18 per hundredweight for the milk introduced into the marketing area, while the pool plant handlers were paying only $6.23 per hundredweight for distributing the same type of milk in the market.[15]

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12. The Supreme Court intimated in *Lehigh Valley* that a marketing order which invoked a rate of contemporary payments which merely placed non pool (unregulated) handlers on a par with pool (regulated) handlers would not be a trade barrier. See 370 U. S. at 98 and 87, n.13.

13. 253 F. Supp. 80 (D. N. J. 1965).

14. *Id.* at 86.

15. 370 U. S. at 86.

It was for the very purpose of affording Lewes an opportunity to adduce evidence to demonstrate the trade barrier effect of the Marketing Order that this court remanded the matter for further administrative procedure. At the administrative hearing on remand, Lewes offered only one witness, its treasurer. He testified that there are between 500 and 600 farmer producers in the area of Delaware where Lewes buys its milk and all but 100 sell their milk to handlers who are regulated by other federal milk marketing orders. He named several local unregulated Delaware handlers with whom Lewes competes in buying milk from producers and in selling it as bottled milk. Although the witness asserted that the prices paid by competitors were lower than those which the Order forced Lewes to pay, he failed to testify as to prices paid by other milk companies and no other evidence was offered by Lewes on this crucial point. In this situation, it cannot be said that the proof offered by Lewes demonstrated the specific discriminatory effect of the challenged regulation as was disclosed in *Lehigh Valley*.

The Secretary relied on the decision of this court in *Titusville Dairy Products v. Brannan*[16] to support the proposition that a milk marketing order may subject a handler who does only part of his business in the marketing area to the pricing requirements of the order on all of his producer milk purchases, including those not intended for distribution in the marketing area. In that case, this court ruled that a Pennsylvania milk company was a fully regulated handler under the order regulating the handling of milk in the New York metropolitan marketing area because it had a permit from the New York City Health Department to sell milk there as required by the marketing

16. 176 F. 2d 332 (3 Cir.), *cert. denied*, 338 U. S. 905 (1949).

order. Hence it was subject to the minimum pricing provision of that order on all of its producer milk receipts even though during part of the period in question it distributed no milk in the marketing area. Lewes contends, and the District Court held, that the Supreme Court in *Lehigh Valley,* overruled *sub silentio Titusville* to the extent that it approved full regulation of a handler introducing only a portion of its production into the marketing area. It is true, as the District Court noted, that in *Titusville* the effect of section 8c(5)(G) on full regulation was not discussed. For that reason *Titusville* does not furnish the support claimed by the Secretary. However, in light of the Supreme Court's declination to consider whether full regulation is permissible under the Act, it cannot be said that *Lehigh Valley* overruled *sub silentio Titusville.*

As the Supreme Court demonstrated in *Lehigh Valley,* section 8c(5)(G) evolved out of the Congressional intent to restrain the Secretary from imposing regulations which would burden the free flow of milk and its products in commerce. It was designed to insure that no regulation would be promulgated placing a greater burden on outside milk and milk products entering the market than was placed on milk and its products within the market. Thus the Secretary in his efforts to protect a particular market may require no more than equal treatment of pool and non-pool milk. Full regulation is not an attempt to keep milk out of the market or a means of placing a greater burden on outside milk entering the market. In fact, it is a means of insuring equality among all handlers operating pool plants which regularly and normally supply the market with fluid milk purchased from producers. Unlike the particular compensatory payment which was involved in *Lehigh Valley,* full regulation in this case can not be characterized

as an attempt to protect those doing business in the market, at the expense of those outsiders seeking to enter the market. Therefore, there is nothing in *Lehigh Valley* which inherently invalidates full regulation. Hence, we cannot agree with the District Court's analysis of *Lehigh Valley* that full regulation, as applied to Lewes is "Surely, . . . the kind of 'economic trade barrier' sought to be prohibited by § (5)(G), as construed in *Lehigh Valley.*" [17]

Moreover, we are persuaded, for other reasons, that the District Court was not justified in overturning the Secretary's decision. The power of the District Court in reviewing the decision of the Secretary, following his adjudicatory hearing,[18] is not a *de novo* fact finding process. It is limited to a determination whether the rulings of the Secretary are in accordance with law and his findings are supported by substantial evidence.[19] If they are, they may not be disturbed. Because there attaches to the determination of an administrative agency a presumption of the existence of facts justifying the determination, the burden of proof falls on the party challenging the validity

17. 260 F. Supp. at 927.

18. 7 U. S. C. § 608c(15)(A) provides:

"Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is *not in accordance with law* and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law." (Emphasis added.)

19. 5 U. S. C. § 706. *United States v. Mills*, 315 F. 2d 828 (4 Cir. 1963); *Wawa Dairy Farms, Inc. v. Wickard*, 149 F. 2d 860 (3 Cir. 1945); *Queensboro Farm Products, Inc. v. Wickard*, 137 F. 2d 969 (2 Cir. 1943).

of the agency's ruling.[20] Applying these standards to the present appeal, it was incumbent on Lewes to demonstrate at the administrative hearing the existence of the alleged trade barrier by showing that it paid more for its milk than its unregulated Delaware competitors. Unless these competitors do in fact enjoy a price advantage, it cannot be said that Lewes suffers an economic burden caused by the Order. The only evidence Lewes offered on the point was the testimony of its treasurer which has been heretofore recounted. It fell far short of the required specific showing.

On the other hand the Department of Agriculture went forward by offering evidence compiled from records submitted by Lewes itself which indicated that Lewes's milk business had grown steadily and in fact increased substantially since the inception of the contested Order.[21] This evidence disclosed that Lewes's Class I sales of fluid milk in Delaware, outside the marketing area, increased from approximately 3.0 million pounds in 1960 to approximately 3.4, 3.8, 3.8 and 4.6 million pounds in 1961, 1962, 1963 and 1964 respectively. At the same time that Lewes increased by more than 50 percent its milk distribution in Delaware, the area where it allegedly experiences the competitive disadvantages, it also managed to increase slightly its sales volume within the regulated marketing area. The figures concerning Lewes purchases from farmer producers also indicate that it has substantially increased such receipts from a total of approximately 3.6 million pounds in 1960 to a total of approximately 4.17, 4.49, 4.96 and 4.93

20. *Windham Creamery, Inc. v. Freeman*, 230 F. Supp. 632 (D. N. J. 1964); *aff'd*, 350 F. 2d 978 (3 Cir. 1965), *cert. denied*, 382 U. S. 979 (1966); *Sterling Davis Dairy v. Freeman*, 253 F. Supp. 80 (D. N. J. 1965).

21. The documentary evidence was compiled for the five years from 1960 to and including 1964, the last year for which complete figures were available at the time of the administrative hearing.

million pounds in 1961, 1962, 1963, and 1964 respectively.[22] The Secretary noted that these figures do not picture a regulated handler who cannot compete in the sale of fluid milk in an unregulated area, or a regulated handler who cannot compete in the procurement of milk with unregulated dealers.

The District Court, however, found vulnerable the evidence of Lewes's markedly increased business, including both its producer receipts and sales in Delaware. These, it stated, were not indicative of increased or even continued levels of profit and were made possible by producers acceptance from Lewes of the lower blend price only during the pendency of this litigation. Lewes's evidence with regard to the profitableness of its business was totally lacking, and if it sought to prove the discriminatory effect of full regulation through diminishing profit, it had the burden and not the Secretary. As to purchase arrangements with its suppliers, Lewes relied solely on the testimony of its treasurer. The Secretary declined to give the uncorroborated testimony offered by Lewes the credence with which the District Court vested it. In this respect the Secretary acted well within his province of weighing the evidence and the District Court was without power to overrule him absent clear evidence to the contrary. In the circumstances, the Secretary can hardly be faulted for concluding that:

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22. In addition to its purchases from producers, Lewes supplements its milk receipts with purchases from a Pennsylvania handler. These purchases of fluid milk which represented approximately one-fourth of Lewes's total milk purchases during the five year period, were made with minor exceptions, at prices substantially below the blend prices required by the Order. Milk purchased from another handler is not subject to the full regulation provisions to which Lewes objects and until August 1964 such purchases were not subject to any federal or state regulation. Since then, a compensatory payment has been required by the Order with regard to such purchases.

> "[Lewes] has failed to sustain its burden of proof herein, that is, [Lewes] has failed to establish an unlawful 'trade barrier' by reason of the contested order and, in fact, has not even proved any competitive disadvantage by virtue thereof in connection with its operations in Delaware, as distinguished from its mere allegations of such disadvantage."

Reviewing the record of the administrative proceedings, it is clear that the Secretary's findings were supported by substantial evidence and that Lewes's trade barrier assertion remained a mere abstraction without evidentiary support. Although the District Court recognized the correct standard in reviewing the decision of the Secretary, it erred in the application of that standard. The role of the District Court is quite narrow; it must assure itself that the petitioning party has been accorded due process in the administrative proceedings. In so doing, the administrative record is reviewed to determine whether the decision rendered therefrom is supported by substantial evidence. The District Court is not free to draw its own independent inferences and conclusions from the record. Yet this is precisely what was done in the instant case. Lewes's challenge to the validity of the Order rests primarily on the assertion that it is unable to meet competition from unregulated handlers in Delaware in the acquisition and sale of milk. The Secretary concluded that:

> "[Lewes] offered no evidence as to the prices paid or other costs incurred by its competitors, and there is accordingly no basis upon which we can compare costs or conclude that [Lewes's] costs are greater, as asserted by its witness."

The District Court rejected the Secretary's conclusion and arrived at an opposite result with the statement:

"The record clearly shows that Lewes is put at a severe competitive disadvantage by the operation of the Secretary's order."[23] Its finding was based on what amounted to an abstract assertion by Lewes that the operation of the Order created an alleged economic trade barrier to its competitive position in the unregulated Delaware area. In overturning the Secretary's decision the District Court exceeded its function in a review proceeding. Contrary to the determination of the District Court, we find it clear that the findings and conclusions of the Secretary were adequately substantial and should not have been disturbed.

In fortification of the decision of the Secretary, some further observations are appropriate. In the Agricultural Marketing Agreement Act, Congress gave the Secretary broad discretionary powers to effectuate its purposes. It is his responsibility to determine which handling of milk shall be isolated for the purpose of regulation. Section 8c(5) of the Act specifies how the milk handling so selected is to be regulated.[24] Under section 8c(5)(A), only the milk

23. 260 F. Supp. at 926.

24. 7 U. S. C. § 608(c)(5) provides in pertinent part:

"(5) In the case of milk and its products, orders issued pursuant to this section, shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

"(i) for the payment to all producers and associations of

received by regulated handlers is to be classified and only regulated handlers must pay producers delivering milk to them the prices specified in the order. It is clear that sections 8c(5)(A) and (B) authorize, in an order issued thereunder, the regulation of a handler's total milk supply from producers, that is, the minimum pricing of all milk received from producers.

The Secretary called as his expert witness, Mr. Herbert L. Forest, Director of the Dairy Division, Consumer and Marketing Service of the United States Department of Agriculture, for the purpose of discussing features of the Marketing Order concerning the conditions in the Chesapeake Bay area which made necessary full regulation of all producer milk received at a pool plant at the same class price according to utilization whether sold in the marketing area or outside the marketing area. In substance Mr. Forest testified that elements were taken into consideration in prescribing geographical boundaries of a marketing area, the difficulties in arriving at them, and that inevitably some distributors would be found who sold their milk both inside and outside the area being established; that where a substantial amount of milk was sold by a handler in the marketing area—and generally ten percent or more of the fluid milk the handler received at its plant from farmers was regarded as substantial—the application of the pooling and pricing of a marketing order to all producer milk received at the handler's plant without regard to its ultimate disposition, was administratively necessary; that unless all of the milk received in such a plant was subject to full regulation the marketing order could be rendered ineffective be-

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producers delivering milk to the same handler of uniform prices for all milk delivered by them: . . .

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; . . ."

cause "open ends" would be left whereby the handler could pay a lower price for milk sold outside the market, reducing the average cost of the handler's total milk supply; that full regulation is intended to prevent a handler from disrupting the regulated market by undercutting its competitors in that market by reason of price advantages it enjoyed outside the market.

On cross-examination Mr. Forest was asked if Lewes operated two plants, one exclusively in the production of milk for sale in the marketing area and the other plant for the production of milk it sells in the unregulated area, whether he agreed that the second plant would be unregulated and, as the Order is now written, Lewes would be in position to exploit the kind of profit shelter that had been described. He replied in the affirmative. The witness was then asked to consider an operation in one plant where five of ten farmers were designated as producing milk for the outside market and five for the inside market, and whether this would work a solution of the administrative problem to which he also replied in the affirmative. Pressed, on further cross-examination, Mr. Forest conceded the workability of other alternatives designed to relieve the handler of paying regulated prices on milk purchased for sale outside the regulated marketing area.

The District Court noted that since the Order was written on a plant basis rather than on a company basis it permits a multiple plant handler to devote only one of its plants for sales into the regulated market with regulation attached only to that plant. This it found underscored the unfairness of the Marketing Order in this case to Lewes since it operates only one plant with 100 percent of its production regulated, but if it segregated its sales it could escape regulation on milk sold in the unregulated area as in the instance of multiple plant handler.

The District Court found that Mr. Forest "agreed that an alternative system could be devised which would require the handler to pay each of its farmers the regulatory price on that percentage of the milk purchased that the handler in turn actually introduced into the marketing area, and permit the handler to pay the local competitive price on the balance of its purchases from each farmer."[25] and that "at least two other administrative techniques were available to assure proper payment of the minimum blend price on that portion of a partially regulated handler's purchases introduced into the marketing area."[26] The District Court concluded that "Either of these alternative techniques used in connection with partial regulation of Lewes, would obviate the need for the unfairness caused by full regulation."[27] Hence it found no valid policy for full regulation of Lewes under the Order and insofar as Lewes was concerned the Order was unnecessary, unfair and arbitrary.

The District Court justified its conclusions by a too literal reading of Mr. Forest's answers interspersed in his lengthy cross-examination. It predicated its reasoning that the Marketing Order was unfair to Lewes on the theory that a handler with two plants could render itself exempt from full regulation by selling all the milk it received at one plant in the market area and selling all the production of the other outside the market, while Lewes with a single plant could not so operate. No showing was made that any handler with more than one plant was thereby escaping full regulation and Mr. Forest made it clear that should such circumstances arise they would promptly induce appropriate regulatory measures. The alternative provisions for regulation found to be available to the Secretary was based on answers given by Mr. Forest which were induced by

25. 260 F. Supp. at 928.
26. *Id.*
27. *Id.*

questions suggesting factors afield from the realities and practicalities of the actual conditions sought to be regulated by the Marketing Order. A review of Mr. Forest's entire testimony leads to the conclusion that the admissions noted by the District Court were counterbalanced by his reiterated statements that past experience had taught that the provision for full regulation was required for effective administration.

If there are alternatives to the Order as framed we are persuaded, as argued on behalf of the Secretary, that the wisdom of his choice of the alternatives is not cognizable in this proceeding. Only the legality of his choice is in issue here. The fact that regulation may be achieved that is equally as efficacious for the purpose of the Act with less expense to Lewes does not render illegal the application of the Order to Lewes.

Other challenges to the validity of this Order prompted the Court of Appeals for the Fourth Circuit to say:

> "After all, the Secretary must look at the area with a wide and comprehensive perspective. He has before him the entire output of milk in the area, and he must search for the best ways and means for its dispositon. Aware of the annual consumption and distribution of fluid milk, he must arrange to channel the residue into outlets the most advantageous to the producer and consumer. He fashions his order accordingly. Of course, there may be some resultant damage to a handler or producer in the enforcement of the Act but this lack of perfection does not destroy the validity of the Order. The constitutionality of the Act is no longer questionable. . . . Absolute equality is not demanded to sustain the operation of the Order. If the Secretary cannot 'produce complete equality, for the variables are to numerous', he 'fulfills his role when he makes a reasoned' Order. . . ."[28]

28. *United States v. Mills*, 315 F. 2d 828, 838.

The foregoing statement is equally cogent in this case.

With a view toward these problems, the Secretary, consistent with the declared policy of the Congress,[29] deemed it essential to the stable and orderly function of the market that handlers operating pool plants which have substantial connections with the market should be fully regulated. Full regulation is neither a new nor an unusual regulatory technique. Similar requirements have been imposed by the Secretary as necessary to insure orderly marketing conditions for more than twenty-five years and now obtain in sixty-five other federal milk marketing orders across the nation. Long-lived and widespread usage alone, of course, does not insulate a system from meritorious attack. On the other hand in the adminstration of so complex an Act by specialists and experts the long standing construction of the statute by the Secretary is entitled to considerable weight at the hands of the courts.[30]

The foregoing discussion leads to the conclusion that Lewes has fundamentally failed to prove that its competition in the unregulated market enjoyed an advantage over it which creates an economic trade barrier contemplated by section 8c(5)(G)[31] as treated by the Supreme Court in *Lehigh Valley Cooperative Farmers, Inc. v. United States*,[32] and we find valid the action of the Secretary in imposing full regulation upon Lewes under Marketing Order No. 16. Hence the judgment of the United States District Court for the District of Delaware of December 12, 1966 will be reversed.

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29. 7 U. S. C. § 602.

30. *Ideal Farms, Inc. v. Benson*, 288 F. 2d 608, 615 (3 Cir. 1961), *cert. den.*, 372 U. S. 965 (1963); *Queensboro Farm Products v. Wickard*, 137 F. 2d 969, 980-981 (2 Cir. 1943).

31. 7 U. S. C. § 608c(5)(G).

32. 370 U. S. 76 (1962).

## JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed December 12, 1966, be, and the same is hereby reversed.

ATTEST:

THOMAS F. QUINN,

*Clerk.*

September 25, 1968.